STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID ABBO, an Individual,
COLORADO TOYZ, INC.,
a Colorado Corporation,
WIRELESS PHONES, LLC,
a Colorado Limited Liability Company,

Plaintiffs/Appellees,

Supreme Court No. 149536
COA No. 304185
CC No. 2007-082804-CK
Hon. Shalina D. Kumar

vs.

WIRELESS TOYZ FRANCHISE, LLC,
A Michigan Limited Liability Company,
JOE BARBAT, an Individual,
RICHARD SIMTOB, an Individual,
JSB ENTERPRIZES, INC., a Michigan
Corporation, and JACK BARBAT,
an Individual,

Defendants/Appellants.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OR FOR PEREMPTORY REVERSAL

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

On June 23, 2014, Defendants/Appellants Wireless Toyz Franchise, LLC, Joe Barbat, Richard Simtob and JSB Enterprises, Inc. (collectively "Wireless Toyz") sought leave to appeal the May 13 majority opinion of the court of appeals on reconsideration (Tab A).[1]

Plaintiffs/Appellees David Abbo, Colorado Toyz, Inc, and Wireless Phones, LLC (collectively "Abbo") chose not to respond. On May 29, 2015, this Court directed the Clerk to schedule oral argument under MCR 7.302(H)(1) and directed the parties to file supplemental briefs. As for Abbo, of course, this brief will not be "supplemental" of anything filed by him in this Court. As for Wireless Toyz, this brief will focus on an updated discussion of:

- The effect to be given to "no representation" clauses;
- The MFIL's statutory preemption of common law fraud theories; and
- The reliance element in Michigan's common law fraud jurisprudence.

This is a franchise case, involving the offer and sale of two types of Wireless Toyz franchises to Abbo, a single-unit franchise in Aurora, Colorado, and an area franchise for the state of Colorado. Franchises are offered and sold through written offering documents prepared in accordance with a comprehensive statutory framework set forth under the Michigan Franchise Investment Law, including detailed disclosure obligations under Section 8 and broad anti-fraud provisions under Section 5. In brief summary, Abbo sued Wireless Toyz in 2007 on nine statutory and common law claims, which after the jury's verdict in 2010 were whittled down to one: common law silent fraud. The circuit court granted JNOV to Wireless Toyz on this verdict. Abbo appealed, and in 2014 a divided court of appeals panel reversed. In this Court, Wireless

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[1] Tab A, the court of appeals majority opinion, is appended to Wireless Toyz' application for leave to appeal. The index to Tabs A through Q—the application attachments—is reproduced in this brief for the Court's convenience. The application itself is cited as "Application __."

Toyz explained what the panel majority held, why it was incorrect, and why it was important.

The majority failed to give effect to the parties' merger/integration clauses, to Abbo's disclaimers of reliance and operating cost representations, and to the rules that apply in the franchise arena, where extensive regulations control how offers are made, what information is provided, and what information cannot be provided. Wireless Toyz did everything possible to ensure that Abbo relied exclusively on the formal offering documents and his own investigation, which is how the franchise relationship is supposed to be formed. Abbo's silent fraud claim was duplicative of and preempted by the statutory fraud claims the jury rejected (Application at 32-34). And there was in any case no silent fraud as a matter of the common law.

A franchisor and franchisee have a very formal contractual relationship. The universe of possible fraud claims between such parties is provided for in the MFIL, specifically Section 5, MCL 445.1505 (misrepresentations and omissions in the offer and sale of a franchise) and related MFIL provisions, especially Section 8 (disclosure obligations). Abbo made these statutory claims and the jury rejected them. More generally, when one party to a contract thinks it has been defrauded, it must distinguish its fraud claims from its contract claims. The economic loss doctrine does not permit the contract claims to be drowned in a sea of tort. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512 (1992). Only fraud-in-the-inducement claims—*i.e.*, claims that a party was tricked into the contract—are not barred by the economic loss doctrine.

As the majority observed, Abbo did not plead a fraud-in-the-inducement claim (Tab A at 8, 2014 WL 1978185 at *7). Abbo thus had no fraud claim at all once the jury rejected his MFIL claim of misrepresentations and omissions. The majority, however, held that a claim of "silent fraud" could serve in lieu of a fraudulent inducement claim to "vitiate" the contract (*id.*). But this is a case where only rescissionary damages were awarded and plaintiff had disclaimed any right to rescission (*id.* at 3, 2014 WL 1978185 at *3). Every aspect of this case illustrates why the MFIL fraud remedy should be held to preempt any other attempted common law fraud claim in a franchise case (Application 32-34).[2] That holding might require this Court to grant leave to appeal and give plenary consideration to this case. Because peremptory relief is also readily available—and preferred—in this case, however, Wireless Toyz will also discuss silent fraud in the terms framed by the court of appeals majority opinion.

Because of the jury's rejection of most of Abbo's claims, Abbo is left only with allegations concerning a vaguely recalled pre-offer "Discovery Day" conversation about hits (discounts decided on by the retailer to attract customers) and chargebacks (commissions recaptured by carriers after customer cancellations).[3] Abbo's evidence as to this July 2004 conversation was set forth in the application (Application at 11-12). This is the sole basis of Abbo's "silent fraud" claim.[4] For several reasons, it is no basis at all.

As discussed below, Abbo signed unambiguous written declarations that Wireless Toyz made *no* representations concerning costs and expenses that were not contained in the contract documents. In Michigan, "no representation" clauses are enforced. Abbo will not be heard to contradict himself and therefore there was no silent fraud and JNOV was appropriately granted.

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2 The MFIL, §34, preempts common law claims subsumed within §§5, 8, and 32.

3 "Hits" are cell phone discounts at the point of sale based on local competition, decided upon by franchisees. See §10.4 of Abbo's UFOC form agreement. "Chargebacks" are lost commission revenue when a customer's wireless service is cancelled within a carrier-specified period of time, typically 6 months. UFOC Item 6 disclosed that all commissions are subject to the chargeback contingency. Abbo admittedly understood both kinds of risks.

4 While hits and chargebacks are the main subject of the majority's section 2 (The Evidence Supporting Silent Fraud) (Tab A at 10-13, 2014 WL 1978185 at *9-*10), the opinion tries to buttress its result by discussing irrelevant allegations unrelated to silent fraud, including cellular carrier relationships, inventory costs, and training program quality (Tab A at 2, 10-11, 2014 WL 1978185 at *1, *9-*10). Ironically, the jury found no damages attributable to hits and chargebacks (Trial Transcript, 3/3/10 at 144-147), the very basis of the silent fraud claim, and instead awarded Abbo a return of his franchise fees (rescissionary damages).

Even if a common law "silent fraud" claim could be brought, despite the MFIL and Abbo's written attestations that there were no oral representations and no reliance, in the court of appeals Abbo misstated this Court's holding in *Titan Ins Co v Hyten*, 491 Mich 547, 557 (2012), when he asserted that the reasonableness of his reliance is irrelevant. Wireless Toyz demonstrated this in the application (Application at 23-25) but will address some additional cases in this brief on the same subject. Also, silent fraud requires a duty to speak, and there is no duty under the MFIL to discuss variable operating expenses like hits and chargebacks in any way other than the formal disclosures made in the Uniform Franchise Offering Circular or UFOC.

The majority held in Opinion III(C)(1) (Duty to Disclose) that Wireless Toyz had a duty to disclose hits and chargebacks under Section 5 of the MFIL (Tab A at 9-10, 2014 WL 1978185 at *8). Abbo, however, failed to recover at trial for alleged Section 5 misrepresentations and omissions. Under the MFIL, the UFOC was not required to itemize operating expenses like hits and chargebacks, merely provide the means by which potential franchisees could estimate these expenses for themselves, which it is undisputed was done here. The UFOC delivered to Abbo was the 2004 edition, with historical information based on 2003 data. At trial, Abbo compared these 2003 figures with his own estimates of 2005-2009 results.

The dissenting judge would have affirmed the JNOV based on the merger/integration clauses and the absence of reasonable reliance (Tab B). The alleged pre-offer oral statements were directly contradicted by the express representations, disclosures, disclaimers, and acknowledgements in the UFOC and in the Franchise Agreement, Development Agent Agreement, and Acknowledgements executed by Abbo. Under the "bespeaks caution" doctrine, it was Abbo who had a duty here to ascertain what sort of discounts (hits) were prevalent on phone sales in Colorado where he planned to do business and what the local experience was on canceled contracts (chargebacks). Hits result from a franchisee's own decisions at the point of sale. Chargebacks also are variable, occur many months after the sale, and are only historical data in a UFOC.

It is with good reason that the MFIL disclosure requirements in MCL 445.1508 exclude such variable operating costs from the UFOC, an annually updated uniform offering document. The UFOC expressly states that 100% of commissions are subject to being charged back, and lists all (not just some) current and former franchisees with contact information. Because the MFIL requires and permits nothing more, the majority opinion clearly erred in finding an MFIL-based duty to support a common law silent fraud claim, leading to a result inconsistent with virtually every franchise law decision nationally and relegating Michigan to outlier status.

This Court should either reverse peremptorily on the basis of the dissenting opinion, which will provide Wireless Toyz with the relief it seeks and go far to remedy the majority's disregard of the law governing merger and integration clauses, or it should grant leave to appeal to address the important issues raised concerning the Michigan Franchise Investment Law.

A. The majority overlooked the "no representation" clauses

The majority focused only on the merger/integration clauses—Section 28 of the franchise agreement and Section 16.9 of the development agent agreement—and overlooked Abbo's specific representations negating the existence of the statements on which his common law silent fraud claim depend. Wireless Toyz quoted these provisions for the court of appeals and again in the application. Abbo acknowledged that:

> Except as provided in the [UFOC] delivered to [Abbo], [Abbo] acknowledges that *Wireless Toyz has not*, either *orally* or in writing, *represented, estimated or projected any specified level of* sales, *costs* or profits *for this Franchise, nor represented the* sales, *costs* or profit level *of any other Wireless Toyz Store*. (Tab E §11.2 at 12; emphasis added)

At the same time, in a separate Acknowledgment (Tab F), Abbo represented that "[n]o oral, written or visual claim or representation, which contradicted the [UFOC], was made to me" (*id.* (c)(2)) and that "[n]o oral, written or visual claim or representation except for what is included in the UFOC, which stated or suggested any sales, income, profit levels or *operating expenses* was made to me" (*id.* (c)(3) (emphasis added).

In the development agent agreement, Abbo likewise acknowledged that

> *neither Wireless Toyz nor any of its agents* have *made* or are authorized to make *any oral*, written or visual *representations or projections of* potential earnings, sales, profits, *costs*, *expenses*, prospects or changes of success *except as set forth in* [the UFOC] or as otherwise set forth in writing. (Tab G §1.4, last paragraph, at 3; emphasis added)

Unambiguous contractual provisions must be enforced as written without regard to the court's opinion as to whether the provision is reasonable. *Rory v Continental Ins Co*, 473 Mich 457, 468-70 (2005) (shortened period of limitations must be enforced as written because reasonableness is not a defense to provisions not contrary to law or public policy). Generally, competent persons who contract voluntarily and fairly must be held accountable to their agreements. *Id.* at 468. This Court has hewed strictly to 'freedom of contract' principles, especially since deciding *Rory*. *See, e.g., Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214 (2007) (unambiguous deed restriction will be enforced as written because the people of Michigan have the freedom to 'freely to arrange their affairs') (quoting *Rory*, 473 Mich at 468)); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 200-01 (2008) (reiterating that unambiguous limitations periods in contracts must be enforced to avoid nullities in express contract language); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 376 (2012) (unambiguous contract provision requiring insureds to notify insurer within 30 days of injury details is enforceable). The court of appeals also has applied *Rory* in interpreting contracts. *See, e.g., Stone v Auto-Owners Ins Co*, 307 Mich App 169, 179 (2014) (policy that did not name surviving spouse as insured must be enforced as written). *Rory* and its progeny all support the notion that contractual provisions will not be nullified if they are unambiguous. Here, the majority has nullified the "no representation" provisions in the parties' contracts.

Abbo made this bargain, part of which is that he agrees he was not told anything about costs or operating expenses if it's not in the UFOC. As to hits, the UFOC explains that pricing is a function of local market competition. Under the parties' contract, franchisees "shall establish the prices at which the Merchandise is to be sold" (Tab E, Franchise Agreement ¶10.4). The existence of chargebacks for canceled activations is disclosed, but without any data concerning individual store experience (Tab D, UFOC, Item 6 at Note 2). The gross earnings information in UFOC Item 19 was historical (for 2003) and averaged, with a prominent warning that business expenses should be investigated and that they were affected by many factors (*id.* Item 19). Abbo's vague and uncertain contrary testimony of a pre-offer conversation is nothing but white noise as against his written acknowledgment that no such representation was made to him. JNOV was required for this reason alone.

B. The MFIL contains its own comprehensive disclosure requirements and antifraud provisions, which preempt common law fraud claims

If this Court decides to grant leave to appeal, it should take the opportunity to include preemption among the issues to be discussed in the calendar-case briefs. Wireless Toyz already has acknowledged that the issue was not presented to the trial court. That is no obstacle if this Court decides on plenary review, since the record is complete and MFIL preemption is a purely legal question. Wireless Toyz fully briefed preemption in the court of appeals, although that court chose not to address it.

Wireless Toyz briefed this issue again in its application to this Court (Application 32-34). This Court has explained that "[w]here legislation is comprehensive, providing in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, there is a legislative intention that a statute preempt common law." *Kyser v Kasson Twp*, 486 Mich 514, 539 (2010) (internal quotations and citations omitted).

Being mindful of this Court's admonition not to merely repeat what it has said already in its application, and as yet having no response argument to rebut, Wireless Toyz merely reminds the Court that the MFIL's comprehensive statutory scheme for the offer and sale of franchises expressly establishes exclusive disclosure duties, statutory causes of action, remedies, and limitations periods. These include a cause of action for fraudulent misrepresentations and omissions under MCL 445.1505, for improper delivery of disclosure documents under MCL 445.1508, and for the liability of officers as to underlying violations of §5 or §8 under MCL 445.1532, as well as a four-year statute of repose in MCL 445.1533. There also are alternative remedies, either damages or rescission, for underlying violations of §§5, 8 and 32 under MCL 445.1531(1). It is clear under §34 that MFIL violations are to be dealt with under the MFIL:

> Except as explicitly provided in this act, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this act or a rule or order hereunder. Nothing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect. MCL 445.1534.

The preemption issue, in a nutshell, turns on whether the last sentence of §34 should be read to preserve a common law "silent fraud" claim even though the same claim undoubtedly exists under the MFIL's antifraud provisions. The very duty to speak found by the court of appeals to support common law silent fraud is an MFIL-created (and fully performed) duty. This Court has not decided the preemption question. The court of appeals has never decided the question. In the application, Wireless Toyz noted two trial court decisions that did consider the question: *R&B Communications, Inc v Wireless Toyz Franchise, LLC*, Oakland Circuit Case No. 10-113623-CK (Hon. Colleen A. O'Brien) (Tab Q, 4/13/11 Tr at 19-21) (the MFIL preempts all common law claims relating to and arising from the offer and sale of another Wireless Toyz franchise) and *Toyz, LLC v Wireless Toyz, Inc*, 799 F Supp 2d 737, 744-45 (ED Mich, 2011) (District Judge Victoria Roberts, disagreeing with Circuit Judge O'Brien).

Judge O'Brien was persuaded by *Samica Enterprises, LLC v Mail Boxes Etc USA, Inc*, 637 F Supp 2d 712 (CD Cal, 2008), a case interpreting the California Franchise Investment Law's analogue to §34. Judge O'Brien believed that the savings clause at the end of §34 was there to ensure that claims beyond the sphere of the MFIL could be brought separately, not to permit duplicative misrepresentation claims already covered comprehensively within the MFIL. Judge Roberts focused only on the savings clause at the end.

Two of the authors of this brief, who also were involved in the cases before Judges O'Brien and Roberts, have written an article on this subject. D. McLeod & B. Witus, *Preemption and the Michigan Franchise Investment Law*, Michigan Bar Journal, Vol 93, No 12, at 18-21 (December 2014). Unsurprisingly, they conclude that common law fraud claims in connection with the offer and sale of franchises are preempted by the MFIL. Abbo had his day in court and fully presented his MFIL-based fraud claims under §5 and §8 to a jury, which rejected them. JNOV was properly granted in this case.

C. The majority misunderstood why Abbo could not satisfy the reliance requirement of a fraud claim, as explained by this Court in *Titan*

Fraud requires reliance on a statement of fact. Silent fraud requires reliance on the implications of an incomplete or misleading statement when there is a duty to disclose. *Titan*, as Wireless Toyz explained in the application (Application 23-25), clarifies that an auto insurer may still claim to be defrauded by a false statement in an insurance application that the applicant has a driver's license, even though the falsity of that statement is "easily ascertainable." The applicant clearly had a duty to disclose, but the insurer did not have a duty to investigate such statements before issuing an insurance policy. It is not that reliance need not be reasonable; it is reasonable for insurers to issue policies based on facially accurate applications.

The situation here is night-and-day different. Abbo was a sophisticated businessman entering into commercial contracts for both a franchise operation and a state-wide development venture.[5] He is trying to circumvent his formal undertakings by 'sort of' remembering something he thinks he was told before he was even offered a franchise (Application at 11-12). The majority opinion thinks that Wireless Toyz was arguing primarily that Abbo failed to diligently inquire about hits and chargebacks from enough other store owners (Tab A at 13; 2014 WL 1978185 at *11). In fact, Abbo either failed to inquire sufficiently or failed to listen adequately, because he had the names and contact information for *every* Wireless Toyz franchisee, contrary to what the court of appeals seemed to think (Tab A at 13-14; 2014 WL 1978185 at *11). But that is not the thrust of Wireless Toyz' argument and it is not the basis on which the circuit court granted JNOV.

Very simply, one cannot claim to "rely" on statements that one declares, promises, contracts, undertakes and otherwise formally asserts in writing that one is ***not*** relying on (even asserting in writing that no such statements were made). *Whitesell Corp v Whirlpool Corp*, 2009 WL 3270265 at *4 (WD Mich 2009) (Tab R; Tabs R through V are attached to this supplemental brief).[6] *That* is why the reliance element is missing from Abbo's silent fraud claim. One can say

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[5] The majority acknowledged that David Abbo was an "entrepreneur" (Tab A at 2; 2014 WL 1978185 at *1). The dissent added, as the record bears out, that he had "proven business acumen" (Tab B at 4; 2014 WL 1978185 at *17). Abbo and his partner Michael Bober had an accountant working on their behalf as they were considering this franchise opportunity (*id.*). "This was not a case of parties with unequal bargaining power or plaintiffs with an exploitable susceptibility" (*id.*). Abbo sought out this opportunity (*id.*) and made money.

[6] *Whitesell*, applying Michigan law, notes the paucity of Michigan cases focused specifically on "no reliance" clauses, but does cite one that upheld such a clause to bar a fraud claim. *Id. at* *4 n.2, *citing Federated Capital Serv v Dextours, Inc*, 2002 WL 868273 at *1 (Mich App

that it is "unreasonable" to rely on an alleged statement after signing such disavowals, but that sort of reasonableness was unaffected by this Court's observations in *Titan* about why auto insurers have no duty to unearth "easily ascertainable" fraud in insurance applications before issuing policies.

Cases decided after *Titan* show how it is to be applied. In *Bev Smith, Inc v Atwell*, 301 Mich App 670 (2013), the purchaser of what was claimed to be a unique 1965 racecar that had belonged to a legendary drag racer (Dave Strickler) brought various fraud claims, including silent fraud, against the seller. Seller was claimed to have fraudulently represented that it was selling "the real and authentic Strickler car" without disclosing the extensive use of replacement parts during the restoration of the car. At the time of the sale, buyer had access to a binder showing the work that was done, with historical photographs. The court of appeals affirmed a decision for seller because buyer could not have been fraudulently induced into entering into the transaction. 301 Mich App at 688-689. *See also Lorenz v Jeannot*, 2015 WL 1931726 at *4 (Mich App 2015) (Tab T) (reliance on oral promise made prior to entering a fully integrated written agreement is per se unreasonable); *Mercantile Bank of Michigan v CLMIA*, 2015 WL 630259 at *5 (Mich App 2015) (Tab U) (silent fraud requires reasonable reliance by the defrauded party).

All well-reasoned franchise cases reject claimed reliance on oral statements not reflected in the formal offering document. In addition to the cases previously cited in Wireless Toyz' application (Application at 26-31), another recent example is *Yogo Factory Franchising, Inc v Ying*, 2014 WL 1783146 (D NJ 2014) (Tab V). Ying, the franchisee, counterclaimed on the basis

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2002) (Tab S). *Whitesell* cites the three factors most important in enforcing a "no reliance" clause—use of a separate clause, express disclaimer of reliance, sophisticated contracting parties—all of which are present here as well. 2009 WL 3270265 at *4.

of fraud and other theories, claiming to have relied on eight assorted representations not contained within the franchise offering document, called a Franchise Information and Disclosure Package in New Jersey. Ying, like Abbo, disclaimed in writing the existence of oral representations that differed from the offering documents. The court dismissed the fraud claims for several reasons, one of which was the unreasonableness of any claimed reliance. *Id.* at *8.

The circuit court understood Wireless Toyz' argument:

> ...Plaintiffs failed to establish the reasonable reliance element of the Silent Fraud claim as a matter of law....[7] [B]ased upon the evidence, any reliance on extra contractual statements was inherently unreasonable. In fact, the Court notes that the extra-contractual statements regarding hits and chargebacks were contradicted by the express disclaimers in the UFOC, Franchise Agreement, Development Agent Agreement, and Acknowledgements.... (Tab H, JNOV Opinion at 18).

The jurors may have thought that Wireless Toyz committed "silent fraud" because it could have supplied Abbo with more information about the costs of operating a franchise, but under the rigid structure of a UFOC, it could not. There was no duty. It could—and did—inform Abbo that all commissions were potentially subject to chargebacks. The circuit court correctly granted JNOV, and this Court should affirm that decision, either peremptorily or after plenary review.

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[7] At this point in the JNOV opinion, deleted here, the trial court erroneously states that the jury was not instructed on the reasonable reliance element of a silent fraud claim. It was. The trial court goes on, however, as quoted above, to reach the same conclusion either way. The court of appeals majority was confused and in error in its original opinion on this instructional issue (Tab C at 12-14), but reconsidered and deleted that discussion from its May opinion (Tab A).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in its application and for the additional reasons stated here, Wireless Toyz asks this Court to grant peremptory relief under MCR 7.302(H)(1) and reverse for the reasons stated in the court of appeals dissenting opinion (Tab B) and reinstate the JNOV entered by the trial court (Tab H).

In the alternative, Wireless Toyz asks this Court to grant leave to appeal from the May 13, 2014 majority decision of the court of appeals (Tab A) to consider the important questions of Michigan franchise law presented but inadequately addressed by the majority.

Respectfully Submitted:

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3172632.1

TAB R

2009 WL 3270265
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

WHITESELL CORPORATION, Plaintiff,
v.
WHIRLPOOL CORPORATION, Whirlpool Mexico S.A. de C.V., and Joseph Sharkey, Defendants,
and
Whirlpool Corporation, Counter-plaintiff,
v.
Whitesell Corporation, Counter-defendant.

No. 1:05–CV–679. | Oct. 5, 2009.

West KeySummary

1 **Fraud**
Effect of Existence of Remedy by Action on Contract

Seller's recovery for alleged fraud was barred by the economic loss doctrine since the alleged fraud concerned a promise of future performance that was extraneous to the contract. The seller alleged that the buyer acted fraudulently when it misrepresented within the contract that it would work in good faith with the seller and that it would provide the seller with a minimum amount of business in addition to the obligations under the contract. Those promises were promises of future performance, not relevant to the contract, and made by the seller. As such, the economic loss doctrine restricted the seller to remedies under the UCC and barred tort recovery.

Cases that cite this headnote

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OPINION

ROBERT HOLMES BELL, District Judge.

***1** This matter comes before the Court on Defendant and Counter–Plaintiff Whirlpool's motion for partial summary judgment on Plaintiff and Counter–Defendant Whitesell's: (1) claims arising under the parties' 1995 strategic alliance agreement; (2) request for rescission of the parties' mutual release; and (3) claim for fraud. (Dkt. No. 423.)On February 19, 2009, the parties agreed to a stipulation and order dismissing: (1) Plaintiff's claims arising under the parties' 1995 strategic alliance agreement; and (2) Plaintiff's request for rescission of the parties' mutual release. (Dkt. No. 461.)Thus, Defendant's original motion for partial summary judgment has been reduced to a motion for partial summary judgment exclusively on Plaintiff's claim for fraud. For the reasons that follow, Defendant's motion will be granted.

I. Factual Background

On March 15, 2002, the parties jointly executed a "Strategic Alliance Agreement" ("2002 SAA"). The 2002 SAA required Defendant to purchase all of Defendant's requirements for certain categories of "fasteners" (screws, nails, nuts, bolts, etc.) from Plaintiff over the term of the 2002 SAA.

The 2002 SAA contained a choice-of-law provision providing that "[t]his Agreement shall be governed in all respects, including validity, interpretation and effect, by and construed in accordance with the internal laws of the State of Michigan."(2002 SAA § 16.8 .) The 2002 SAA contained a merger clause providing that "the parties acknowledge and agree that ... there are no oral agreements or understanding [sic] between them affecting the subject matter of this Agreement."(2002 SAA § 16.2.) The 2002 SAA also contained a no-reliance clause providing that:

> Each party acknowledges that it has had full opportunity to consult with such legal and financial advisors as it has deemed necessary or advisable in connection with its decision knowingly to enter into this Agreement. Neither party has executed this Agreement in reliance on any representations, warranties, or statements made by the other party hereto other than those expressly set forth herein.

(2002 SAA § 16.10.)

According to Plaintiff, and not currently disputed by Defendant, Defendant made five allegedly fraudulent representations to Plaintiff prior to or contemporaneous with the execution of the 2002 SAA:[1] (1) that Defendant could not purchase the cold-headed and threaded fasteners listed on Exhibit B–2 from Plaintiff because Defendant was already contractually obligated to purchase those parts from other suppliers (Dkt. No. 444, Pl.'s Resp. 2, 7–8); (2) that Defendant would provide Plaintiff with a minimum of $5–6 million of new business in addition to the obligations under the contract each year (*Id.* at 2, 7); (3) that Defendant intended to transfer $75 million in revenue to Plaintiff by virtue of the 2002 SAA (Dkt. No. 14, Am. Compl. ¶ 122; Dkt. No. 444, Pl.'s Resp. 7); (4) that Defendant intended to use Plaintiff as its primary supplier of fasteners through 2007 (Dkt. No. 14, Am. Compl. ¶ 122; Dkt. No. 444, Pl.'s Resp. 7); and (5) that Defendant intended to work in good faith with Plaintiff during the course of the 2002 SAA (Dkt. No. 14, Am.Compl.¶ 122). Defendant has moved for summary judgment on Plaintiff's fraud claims brought pursuant to all five of these alleged misrepresentations.

II. Law and Analysis

1. Applicable Law

***2** A federal district court sitting in diversity applies the substantive law, including the choice-of-law rules, of the state in which it sits. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). If, however, a case is transferred from one federal district court to another pursuant to 28 U.S.C. § 1404(a), the transferee court applies the law of the state in which the transferor state sits. *Van Dusen v. Barrack,* 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). The case at hand was transferred to this Court from the United States District Court for the Northern District of Alabama pursuant to § 1404(a). (Dkt. No. 48, Op. & Order 11–12.) Thus, this Court must apply the substantive law of the state of Alabama, including the choice-of-law rules of that state.

Alabama choice-of-law rules allow parties to agree on the governing law by including a choice-of-law provision in a contract. *Lifestar Response of Ala., Inc. v. Admiral Ins. Co.,* No. 1060776, 2009 WL 280457, at *12 n. 3 (Ala. Feb. 06, 2009). While a choice-of-law provision always governs contractual claims related to the contract, under Alabama law a choice-of-law provision only encompasses tort claims related to the contract, including fraud claims, if the choice-of-law provision is written broadly enough to encompass such claims. In *Williams v. Norwest Fin. Ala., Inc.,* 723 So.2d 97 (Ala.Civ.App.1998), the Alabama Court of Appeals held that a choice-of-law provision in an agreement providing that "[the agreement is] governed by the laws of Alabama" applied only to contractual disputes arising out of the agreement and was not broad enough to encompass the plaintiff's claim for fraudulent misrepresentation. *Id.* at 101.There is little additional Alabama law addressing the adequacy of choice-of-law provisions to cover tort claims arising out of contractual agreements. State and federal courts alike, however, have found choice-of-law provisions to be broad enough to encompass tort claims when those provisions are written to cover, for example, "any claim or controversy of or relating to" the agreement, *Turtur v. Rothschild,* 26 F.3d 304, 309 (2d Cir.1994), "all issues" concerning "enforcement of the rights and duties of the parties,"*Capital Z v. Health Net, Inc.,* 43 A.D.3d 100, 103, 840 N.Y.S.2d 16 (N.Y.2007), or "all aspects of the legal relationship,"*Jiffy Lube Int'l, Inc. v. Jiffy Lube of Pa., Inc.,* 848 F.Supp. 569, 576 (E.D.Pa.1994).

The choice-of-law provision in the 2002 SAA is written broadly. It provides that the 2002 SAA "shall be governed in all respects, including validity, interpretation and effect" by the laws of Michigan. The term "in all respects" and the inclusion of questions surrounding the "validity" of the 2002 SAA suggest that this provision is closer in kind to those provisions held by most courts to cover fraud claims than to the provision in *Williams.*The Court holds that all of Plaintiff's claims, including Plaintiff's claims for fraud, are governed by Michigan law.

2. The Merger Clause

***3** Under Michigan law, a merger clause (sometimes called an "integration clause") can preclude a fraud claim in two related ways. First, by establishing that a written contract is an integrated agreement, a merger clause brings into play the parol evidence rule, which prohibits evidence of oral promises made prior to or contemporaneous with the execution of a written agreement. *UAW–GM Human Res. Ctr. v. KSL Recreation Corp.,* 228 Mich.App. 486, 579 N.W.2d 411, 414 (Mich.Ct.App.1998). Second, since a merger clause nullifies a promise not included in the written agreement, it also makes reliance on that promise unreasonable. *UAW–GM,* 579 N.W.2d at 419; *Diamond Computer Sys. v. SBC Commc'n, Inc.,* 424 F.Supp.2d 970, 985 (E.D.Mich.2006). Reasonable reliance is one element of a fraud claim under Michigan law. *Novak v. Nationwide Mut. Ins. Co.,* 235 Mich.App. 675, 599 N.W.2d 546, 553 (Mich.Ct.App.1999).

Even if a written agreement is integrated by virtue of a merger clause, however, parol evidence may be introduced to show that the agreement itself was procured by fraud. *Plate v. Detroit Fid. & Sur. Co.,* 229 Mich. 482, 201 N.W. 457, 458 (Mich.1924). But to qualify for this exception to the parol evidence rule, the alleged misrepresentation must be so severe that it "invalidates the entire contract." *UAW–GM,* 579 N.W.2d at 509. Misrepresentations that relate to "discrete" terms of the contract are not sufficient to "invalidate[ ] the entire contract." *Diamond,* 424 F.Supp.2d at 985. On the other hand, "representations of fact made by one party to another to induce that party to enter into a contract" are considered fraud that "invalidates the entire contract." *LIAC, Inc. v. Founders Ins. Co.,* 222 F. App'x 488, 493 (6th Cir.2007) (quoting *Star Ins. Co. v. United Commercial Ins. Agency, Inc.,* 392 F.Supp.2d 927, 928–29 (E.D.Mich.2005)); *see also Custom Data Solutions v. Preferred Capital, Inc.,* 274 Mich.App. 239, 733 N.W.2d 102 (Mich.Ct.App.2006). Since a merger clause makes reliance on statements unreasonable because it makes evidence of those statements inadmissible under the parol evidence rule, it follows that when a statement is *not* inadmissible in light of a merger clause, reliance on that statement is also not unreasonable. *See Diamond,* 424 F.Supp.2d at 984–85; *Custom Data,* 733 N.W.2d at 104–06.

Plaintiff does not dispute that the 2002 SAA was an integrated version of the parties' agreement. Plaintiff, however, argues that Defendant used fraudulent misrepresentations to induce Plaintiff into signing the agreement. (Dkt. No. 444, Pl.'s Resp. 21.) According to Plaintiff, these misrepresentations, if proven, constitute fraud that would invalidate the entire 2002 SAA because Plaintiff would not have entered into the contract had it known the truth.(*Id.;* Dkt. No. 440, Pl.'s Resp. 16 ("Plaintiff never would have entered into the 2002 SAA had it known the truth about the Exhibit B–2 list.").) All of the alleged misrepresentations, such as Defendant's representation that it intended to transfer $75 million in revenue to Plaintiff by virtue of the 2002 SAA, do not relate to any "discrete" terms of the agreement, but are substantial misrepresentations that could have induced Plaintiff to enter into the entire 2002 SAA. For this reason, Defendant's alleged misrepresentations "invalidate[ ] the entire contract." The merger clause does not bar evidence of these misrepresentation or make Plaintiff's reliance on these misrepresentations unreasonable.

3. The No–Reliance Clause

***4** Like a merger clause, a no-reliance clause can abrogate the reliance element of a plaintiff's fraud claim. However, while a merger clause purports to make reliance on statements unreasonable indirectly by first making them inadmissible under the parol evidence rule, a no-reliance clause directly and explicitly makes reliance on statements unreasonable. For this reason, no-reliance clauses have an altogether different effect than merger clauses on the reasonableness of reliance, and they therefore require a different analysis.*Deluxe Media Servs. v. Direct Disc Network, Inc.,* No. 06 C 1666, 2007 WL 707544, at *6–7 (N.D.Ill. Mar.2, 2007) (holding that while merger clauses may not preclude fraud claims, no-reliance clauses may); *FMC Techs., Inc. v. Edwards,* No. C05–946C, 2007 WL 1725098, at *4 (W.D.Wash. June 12, 2007) ("It is undisputed that there is a significant difference between integration clauses and no-reliance clauses in contracts.").

Very few Michigan cases address the validity of no-reliance clauses.[2] A survey of persuasive authority reveals that courts generally look for three factors to determine if a noreliance clause will successfully abrogate the reliance element of a fraud claim. First, courts are more willing to enforce a no-reliance clause if the provision disclaiming reliance is its own separate clause rather than a provision embedded within another clause of the agreement, such as a merger clause or an exculpatory clause. *See Vigortone AG Prod., Inc. v. PM AG Prods., Inc.,* 316 F.3d 641, 644 (7th Cir.2002); *Rissman v. Rissman,* 213 F.3d 381, 385 (7th Cir.2000); *Tirapelli v. Advanced Equities, Inc.,* 351 Ill.App.3d 450, 286 Ill.Dec. 445, 813 N.E.2d 1138, 1145 (Ill.App.Ct.2004); *CFJ Assocs. of N.Y. Inc. v. Hanson Ind.,* 274 A.D.2d 892, 894, 711 N.Y.S.2d 232 (N.Y.App.Div.2000). Second, courts are more willing to enforce a no-reliance clause if it expressly mentions and disclaims "reliance." *See Rissman,* 213 F.3d at 385; *Deluxe Media Servs. v. Direct*

Disc Network, Inc., No. 06 C 1666, 2007 WL 707544, at *6–8 (N.D.Ill. Mar.2, 2007). Third, courts are more willing to enforce a no-reliance clause if the contracting parties are sophisticated. *Insitu, Inc. v. Kent*, No. CV–08–3067–EFS, 2009 WL 2160690, at *3–4 (E.D.Wash. July 17, 2009); *Tirapelli*, 286 Ill.Dec. 445, 813 N.E.2d at 1144; *Vigortone AG*, 316 F.3d at 645.

The no-reliance clause contained in the 2002 SAA is separate and independent from the merger clause. It expressly mentions reliance. Plaintiff and Defendant, together with their attorneys, are both sophisticated commercial parties. Every court that has addressed the issue would enforce the no-reliance clause under the circumstances presented here. The no-reliance clause is thus enforceable as a matter of law. Plaintiff cannot establish its fraud claims for alleged misstatements made outside of the terms of the 2002 SAA.

By its express terms, the no-reliance clause does not abrogate reliance on misstatements that are expressly included in the 2002 SAA. (2002 SAA § 16.10.) Two of the five alleged misrepresentations that form the basis of Plaintiff's fraud claims are embodied, at least to some extent, in the 2002 SAA.[3]Defendant's representation that it would provide Plaintiff with a minimum of $5–6 million of new business in addition to the obligations under the contract each year appears at the bottom of Exhibit B–1 of the 2002 SAA.[4](2002 SAA Ex. B–1.) Additionally, Defendant's representation that it will work in good faith with Plaintiff appears in Sections 10[5] and 11[6] of the 2002 SAA. (2002 SAA §§ 10, 11.) Therefore, though the no-reliance clause abrogates the reliance element of Plaintiff's fraud claims brought pursuant to alleged misstatements not expressly included in the 2002 SAA, it does not abrogate the reliance element of Plaintiff's fraud claims brought pursuant to the alleged misrepresentations contained in Sections 10 and 11 of the 2002 SAA and Exhibit B–1 of the 2002 SAA.

4. The Economic Loss Doctrine

***5** Michigan has adopted the economic loss doctrine. *Neibarger v. Universal Coops., Inc.*, 439 Mich. 512, 486 N.W.2d 612 (Mich.1992). The economic loss doctrine "bars tort recovery and limits remedies to those available under the Uniform Commercial Code where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic."*Id.* at 613.In a broad sense, the economic loss doctrine is intended to provide commercial contracting parties with the certainty that claims arising out of the contract will be governed exclusively by the UCC, and allow those parties to negotiate accordingly. *Id.* at 616;*see also Williams Elec. Co. Inc. v. Honeywell, Inc.*, 772 F.Supp. 1225, 1237 (N.D.Fla.1991) ("There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions.") As noted in *Neibarger*, the economic loss doctrine prevents contract law from "drown[ing] in a sea of tort law."*Neibarger*, 486 N.W.2d at 618 (*quoting East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)). Under the economic loss doctrine, a plaintiff may not maintain a fraud claim for a defendant's failure to fulfill a promise that is "interwoven with the breach of contract."*Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich.App. 365, 532 N.W.2d 541, 545 (Mich.App.1995). In such a case, breach of contract is the plaintiff's only cause of action.

The parties dispute whether the economic loss doctrine bars fraud claims brought by sellers of goods as well as claims brought by purchasers of goods. Defendant relies on *Dinsmore Instrument Co. v. Bombarider, Inc.*, 999 F.Supp. 968 (E.D.Mich.1998), which explicitly held that the economic loss doctrine applies to claims brought by sellers of goods. (Dkt. No. 596, Ex. A at 2–3.) Plaintiff relies on *Michigan Dessert Corp. v. Baldwin Richardson Foods, Inc.*, No. 06–15726, 2007 U.S. Dist. LEXIS 24305, 2007 WL 851001 (E.D.Mich. March 15, 2007) (unpublished opinion), which explicitly held that the economic loss doctrine does not apply to claims brought by sellers of goods. (Dkt. No. 593, Ex A at 3.) *Dinsmore* and *Michigan Dessert* are both decisions of the United States District Court for the Eastern District of Michigan in which that court was asked to apply Michigan law. It is the duty of this Court to ascertain Michigan law by examining the decisions of Michigan state courts, and although *Dinsmore* and *Michigan Dessert* provide persuasive authority, the Court is not obligated to follow either decision. *See Allstate Ins. Co. v. Thrifty Rent–A–Car Systems, Inc.*, 249 F.3d 450, 454 (6th Cir.2001).

Plaintiff also cites several decision by Michigan state courts that Plaintiff argues limit the application of the economic loss doctrine to claims brought by purchasers, such as *Neibarger, Huron Tool*, and *MASB–SEG Prop./Cas. Pool, Inc. v. Metalux*, 231 Mich.App. 393, 586 N.W.2d 549 (Mich.Ct.App.1998). (Dkt. No. 593, Ex A at 3–4.) Although Plaintiff is correct to assert that these cases do apply the economic loss doctrine to claims brought by purchasers, the Court does not agree that these cases clearly exclude claims brought by sellers from the scope of the doctrine.

***6** The Court relies on *General Motors Corp. v.*

Alumi–Bunk, Inc., 482 Mich. 1080, 757 N.W.2d 859 (Mich.2008), to hold that, under Michigan law, the economic loss doctrine bars fraud claims that are interwoven with a contract brought by sellers as well as buyers of goods. In *General Motors*, the plaintiff agreed to sell hundreds of Chevrolet Silverado trucks to the defendant. *Gen. Motors Corp. v. Alumi–Bunk, Inc.*, No. 270430, 2007 WL 2118796, at *1 (Mich.Ct.App. July 24, 2007), *rev'd,*482 Mich. 1080, 757 N.W.2d 859 (Mich.2008). As part of the sale agreement, the defendant promised to "upfit,". or modify, the vehicles before reselling them so not to compete with the sale of non-modified vehicles by the plaintiff. *Id.* When the defendant failed to upfit the vehicles before reselling them, the plaintiff brought suit for breach of contract and fraud. Adopting the dissenting opinion of the Court of Appeals, the Michigan Supreme Court held that the economic loss doctrine barred the plaintiff's fraud claim. *Gen. Motors,* 757 N.W.2d at 859.

In all relevant respects, the factual background of *General Motors* is identical to that of the case at hand. In both cases, the allegedly fraudulent statement was a promise of future performance, it was interwoven with the contract of sale itself rather than "extraneous" to the contract, and it was made by the purchaser rather than the seller. Consistent with the holding in *General Motors,* the Court holds that the economic loss doctrine bars Plaintiff's claims for fraud based on Defendant's alleged misrepresentations that it would work in good faith with Plaintiff as provided in Sections 10 and 11 of the 2002 SAA, and that it would provide Plaintiff with a minimum of $5–6 million of new business in addition to the obligations under the contract each year as provided in Exhibit B–1 of the 2002 SAA. These promises are interwoven with the 2002 SAA, and Plaintiff is limited to the breach of contract remedies provided under the UCC for Defendant's alleged failure to honor them.

III. Conclusion

Plaintiff's claims for fraud based on Defendant's alleged misrepresentations (1) that Defendant could not purchase the cold-headed and threaded fasteners listed on Exhibit B–2 from Plaintiff because Defendant was already contractually obligated to purchase those parts from other suppliers; (2) that Defendant intended to transfer $75 million in revenue to Plaintiff by virtue of the 2002 SAA; and, (3) that Defendant intended to use Plaintiff as its primary supplier of fasteners through 2007, are barred by the no-reliance clause of the 2002 SAA. Plaintiff's claims for fraud based on Defendant's alleged misrepresentation (1) that Defendant would work in good faith with Plaintiff as provided in Sections 10 and 11 of the 2002 SAA; and (2) that Defendant would provide Plaintiff with a minimum of $5–6 million of new business in addition to the obligations under the contract each year as provided in Exhibit B–1 of the 2002 SAA are barred by the economic loss doctrine. Defendant is therefore entitled to summary judgment on all of Plaintiff's five claims for fraud.

*7 An order consistent with this opinion will be entered.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3270265

Footnotes

1 Plaintiff's complaint asserts one catch-all claim for fraud. (Dkt. No. 14, Am.Compl.¶¶ 118–136.) However, Plaintiff identifies five allegedly fraudulent misstatements. Therefore, the Court will treat and refer to Plaintiff's claim for fraud collectively as Plaintiff's claims for fraud.

2 The most relevant Michigan case is *Federated Capital Services v. Dextours, Inc.*, No. 228208, 2002 WL 868273 (Mich.Ct.App. Apr.26, 2002), in which the Michigan Court of Appeals upheld a no-reliance provision to preclude the plaintiff's fraud claims. *Id.* at *1. *Dextours,* however, is an unpublished opinion.

3 Plaintiff also argues that Defendant's alleged misrepresentation that it would use Plaintiff as its primary parts supplier through 2007 also appears in the 2002 SAA since Section 3.4 of the 2002 SAA made the intended scope of the agreement between the two parties certain commodity codes. (Dkt. No. 444, Pl.'s Resp. 24) However, the 2002 SAA says nothing of Defendant's intention to make Plaintiff its "primary parts supplier," only Defendant's intention to purchase certain enumerated items from Defendant. It would be a stretch for the Court to extend Defendant's explicit purchase obligations under the 2002 SAA to a promise by Defendant to make Plaintiff its "primary parts supplier."

4 Exhibit B–1 of the 2002 SAA obligates Defendant to provide Whitesell with a "potential business growth opportunity between $5 to $6 million" each year to supplement Defendant's other purchase obligations under the 2002 SAA.

5 Section 10 of the 2002 SAA requires the parties to "use good faith business efforts to work towards and [sic] acceptable arrangement" if compliance with the agreement for some reason caused economic hardship to one of the parties.

6 Section 11 requires the parties to "use their best efforts to attempt to resolve any disputes" arising out of the agreement.

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TABS

2002 WL 868273
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

FEDERATED CAPITAL SERVICES, Plaintiff / Counter-Defendant-Appellee,
v.
DEXTOURS, INC., and Anthony B. Dextor, a/k/a Anthony B. Dexter, Defendants / Counter-Plaintiffs / Third-Party Plaintiffs-Appellants,
and
EQUIPMENT SYSTEMS, INC., and William Adams, Third-Party Defendants-Appellees.

No. 228208. | April 26, 2002.

Before: BANDSTRA, P.J., and SMOLENSKI and METER, JJ.

UNPUBLISHED

PER CURIAM.

***1** Defendants appeal as of right, challenging the circuit court's order granting plaintiff summary disposition on its complaint for breach of a lease financing agreement, as well as its order dismissing defendants' counter-claim. We affirm.

As a threshold matter, we reject plaintiff's argument that this Court lacks jurisdiction to review the dismissal of the counter-claim. Although the order dismissing the counter-claim was entered on June 1, 2000, the order granting plaintiff summary disposition on its complaint was not entered until June 5, 2000. The latter order constitutes the "final order" from which an appeal of right could be taken. MCR 7.202(7). Defendants' claim of appeal was timely filed on June 26, 2000. MCR 7.203(A)(1); MCR 7.204(A)(1)(a)."Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case."*Bonner v. Chicago Title Ins Co,* 194 Mich.App 462, 472; 487 NW2d 807 (1992).

Defendants argue that summary disposition of plaintiff's complaint and dismissal of the counter-claim was improper because several questions of material fact remained for trial. A circuit court's decision on a motion for summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Allen v. Keating,* 205 Mich.App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996); see also *Smith v. Globe Life Ins Co,* 460 Mich. 446, 454-455 and n 2; 597 NW2d 28 (1999). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or documentary evidence that a genuine issue of disputed fact exists. *Quinto, supra* at 361-362.The party may not rest on the mere allegations or denials contained in the pleadings but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Id.* at 362, 371.A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence.*Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich. 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra* at 367, 371-372 (a question of fact exists where there is sufficient evidence to allow a reasonable jury to find in the nonmoving party's favor).

Defendants next argue that summary disposition of plaintiffs' complaint and dismissal of their counter-claim was improper because a question of material fact remained concerning fraud.

The elements of fraud are: (1) a material misrepresentation, (2) that was false, (3) made with knowledge of its falsity or recklessness of its truth, (4) made with the intent that the claimant rely upon it, (5) that the claimant did rely on the misrepresentation, and (5) that the claimant thereby suffered injury. *Kassab v Michigan Basic Prop Ins Ass'n,* 441 Mich. 433, 442; 491 NW2d 545 (1992). Here, defendants did not raise fraud either as an affirmative defense to plaintiff's complaint and did not raise fraud in their counter-claim against plaintiff. Instead, defendants alleged fraud and misrepresentation only against third-party defendant Adams. In any event, pursuant to the terms of the lease agreement, defendants expressly disclaimed any reliance on any statements or representations made by plaintiff. By its plain terms, the agreement negates the reliance element necessary to prevail on a claim of fraud. Therefore, defendants cannot establish a question of fact concerning fraud.

*2 Defendants also argue that questions of fact existed concerning whether plaintiff committed the first material breach of the agreement and whether the bus was defective. Under the terms of the lease agreement, however, defendants' obligation to pay the basic lease payments was absolute and unconditional, "and not subject to any abatement, defense, counterclaim or offset for any reason whatsoever."The agreement also provides that defendants "shall pay all expenses with respect to the use and operation" of the bus and that plaintiff "shall not be obligated to provide any maintenance, repairs, labor, parts or service for any Vehicles."Further, defendants agreed to bear "[a]ll risk of damage to or loss ... [and] no such damage, loss or destruction shall abate or reduce [defendants'] ... obligation to pay the Basic Rent."

The agreement also contains a capitalized disclaimer of all warranties, stating that defendants made the selection of the vehicle based upon their own judgment, that defendants were expressly disclaiming any reliance upon any statements or representations made by plaintiff, and that plaintiff "makes no representations or warranties ... of any kind ... including without limitation ... condition, quality, durability ... manufacture or performance of vehicle, and disclaims any implied warranty of merchantability or fitness for a particular purpose."The same disclaimer states that plaintiff "shall have no liability to defendants for any demand, claim, costs, loss, damage or liability of any kind ... nor shall there be any abatement of payments, arising out of or in connection with (i) any deficiency[,] defect or inadequacy, whether or not known or disclosed to [plaintiff], [or] (ii) the use or performance of the vehicle[.]"

In light of the foregoing, the fact that the bus may have been in poor condition and may have needed repairs would not constitute a breach of the contract. Further, the implied warranty of merchantability was expressly and conspicuously disclaimed. Thus, unless defendants could avoid the clear language of the agreement, the trial court properly found that there was no genuine issue of material fact concerning whether plaintiff committed the first material breach of the agreement, nor whether the bus was defective in a manner that precluded summary disposition.

In an attempt to avoid portions of the lease, defendants claim that the agreement is unreasonable or unconscionable, and that plaintiffs acted unreasonably or unconscionably. A court may invalidate or modify, in whole or in part, a lease agreement that was unconscionable as a matter of law at the time the contract was made. MCL 440.2808(1)."The examination of a contract for unconscionability involves inquiries for both procedural and substantive unconscionability."*Hubscher & Son, Inc v. Storey,* 228 Mich.App 478, 481; 578 NW2d 701 (1998). Accordingly, there is a two-prong test to determine unconscionability:

> *3 (1) What is the relative bargaining power of the parties, their relative economic strengths, the alternative sources of supply, in a word, what are their options?; [and] (2) Is the challenged term substantively unreasonable? [*Id.,* quoting *Northwest Acceptance Corp v. Almont Gravel, Inc,* 162 Mich.App 294, 302; 412 NW2d 719 (1987).]

Here, defendants failed to submit any evidence addressing the parties' options, bargaining power, relative economic strengths, or alternative sources of financing. Therefore, the circuit court correctly determined that defendants failed to establish a genuine issue of material fact concerning unconscionability.

Defendants further argue that questions of fact existed concerning whether plaintiff improperly failed to mitigate its damages and whether it disposed of the collateral in a commercially unreasonable manner.

Concerning the sale of the collateral, the agreement states that, upon defendants' default, plaintiff may "(d) sell any and all of the Vehicles at a public or private sale, with or without notice to [defendants] or advertisement, or otherwise, (sic) dispose of, hold, use, operate, lease to others or keep idle any such Vehicle, all as [plaintiff] in its sole discretion may determine and all free and clear of any rights of [defendants] and without any duty to account to [defendants] for any proceeds with respect thereof [.]" The agreement also provides that defendants "shall continue to be liable for all its indemnities and other obligations under this Lease and for all legal fees and costs and expenses arising in connection with the foregoing defaults or the exercise of [plaintiff's] remedies[.]" Further, to the extent permitted by applicable law, defendants also agreed to "waive[ ] any rights now or hereafter conferred by statute or otherwise which may require [plaintiff] to sell, lease or otherwise use any Vehicle in mitigation of [plaintiff's] damages or that may otherwise limit or modify any of [plaintiff's] rights or remedies hereunder."

Thus, defendants contractually waived any right they had to (1) compel plaintiff to mitigate its damages, and (2) compel plaintiff to hold a commercially reasonable sale of the collateral. Also, as previously noted, defendants have failed to show that these provisions should be set aside on grounds of unconscionability.

Insofar that defendants argue that the circuit court failed to state its reasons for dismissing the counter-claim, we find no merit to this issue. It is apparent that the court addressed each of defendants' counter-claims in the context of explaining its decision on plaintiff's motion for summary disposition.

Defendants also claim that the circuit court erred in granting summary disposition without allowing them to conduct discovery. We disagree. Generally, summary disposition is premature if it is granted before discovery on a disputed issue is complete. *State Treasurer v. Sheko,* 218 Mich.App 185, 190; 553 NW2d 654 (1996). However, summary disposition is not premature if the requested discovery "does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition."*Id.*

***4** In this case, plaintiff filed its complaint on August 25, 1999, and served defendants on November 2, 1999. Defense counsel filed an appearance on December 8, 1999, along with a motion for summary disposition of plaintiff's claims. That motion was denied by order dated February 4, 2000, and defense counsel filed an answer to plaintiff's complaint on February 17, 2000. According to trial court's 1999 scheduling order, the discovery cutoff date was March 12, 2000. On March 23, 2000, after the close of discovery, the trial court approved the parties' stipulation allowing defendants to file a counter-claim and a third-party complaint. However, defendants did not actually file the counter-claim and third-party complaint until April 14, 2000.[1]

Plaintiff then filed a motion for summary disposition on its original complaint, as well as a motion for summary disposition on defendants' counter-complaint. The trial court conducted oral arguments on those motions on May 17, 2000. At that hearing, plaintiff argued that discovery had long since closed and that no genuine issues of material fact existed, entitling plaintiffs to judgment as a matter of law. Defendants disagreed that discovery had closed, but on the sole ground that the third-party complaint had not yet been served. There is no indication in the record that defendants ever requested that the trial court extend discovery on plaintiff's original complaint or defendants' counter-claim. Indeed, there is no indication in the record that defendants even attempted to conduct any discovery before the discovery cutoff date. Under these circumstances, we conclude that summary disposition was not premature.

Affirmed.

All Citations

Not Reported in N.W.2d, 2002 WL 868273

Footnotes

1 It does not appear that defendant ever accomplished service on the third-party defendant.

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2015 WL 1931726
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Kirk LORENZ, Plaintiff–Appellant,
and
Robert K. Kaufman, Appellant,
v.
Arthur JEANNOT and Eden Brook, LLC,
Defendants–Appellees.

Docket No. 319802. | April 28, 2015.

Benzie Circuit Court; LC No. 12–009578–CZ.

Before: OWENS, P.J., and JANSEN and MURRAY, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants. He also challenges an award of sanctions. We affirm.

Plaintiff is the former owner of the Brookside Inn. Defendant Arthur Jeannot owns defendant Eden Brook, LLC (Eden Brook), which is the current owner of the inn. Plaintiff lost the inn and all its contents in a 2008 judgment of foreclosure granting the property to Honor Bank. On May 4, 2011, Eden Brook purchased the property. On May 1, 2011, plaintiff and Eden Brook entered into a lease agreement whereby plaintiff leased to Eden Brook a parcel of real property adjacent to the Brookside Inn for a term of 20 years in exchange for rent of $1 per year. The lease contained an option for Eden Brook to purchase the property for its fair market value after the first year of the term. The lease granted Eden Brook "the complete, unfettered ability to utilize the premises in any manner it wishes so long as consistent with zoning regulation," and stated that Eden Brook had rights including "but ... not limited to, the physical modification or destruction of any buildings or fixtures now existing thereon."The lease also contained an integration clause stating that the written instrument was the "entire agreement between the parties."

In a letter dated November 8, 2012, Jeannot informed plaintiff that he intended to remove a message board sign attached to the parking lot property and asserted his right to do so under the lease. Plaintiff sued, seeking rescission of the lease on the ground of fraud. Specifically, plaintiff alleged that Jeannot induced him to enter the lease by promising him a business interest in the Brookside Inn, but never made good on that promise. On May 31, 2013, plaintiff amended his complaint to include a claim of conversion of personal property located in the Brookside Inn and a count of "claim and delivery" (replevin) regarding the same property.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10)[1] and the court granted the motion. Regarding the claim for rescission for fraud, the trial court ruled that the parol evidence rule prevented plaintiff from asserting that defendants had orally promised to grant him an interest in the inn. Regarding the claim for the personal property, the court applied the doctrine of laches, finding that plaintiff had failed to diligently pursue any claim he might have had to his personal property. The court also found plaintiff's claims frivolous and awarded defendants costs and fees. This appeal followed.

I

Plaintiff first challenges the grant of summary disposition to defendants on the fraud claim. We review de novo the trial court's decision on a motion for summary disposition. *Mercantile Bank Mortgage Co, LLC v. NGPCP/BRYS Centre, LLC,* 305 Mich.App 215, 223; 852 NW2d 210 (2014)."A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."*Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999).

> ***2** A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most

> favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden,* 461 Mich. at 120.]

"The parol evidence rule may be summarized as follows: '[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." ' *UAW–GM Human Resource Center v. KSL Recreation Corp,* 228 Mich.App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v. Omar Operating Co,* 184 Mich.App 574, 580, 458 NW2d 659 (1990). Michigan law recognizes the following four exceptions to the parol evidence rule:

> [E]xtrinsic evidence is admissible to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. [*UAW–GM,* 228 Mich.App at 493.]

As noted, the lease agreement contained an unambiguous integration clause stating that the written agreement was the entire agreement between the parties. "[A]n integration clause precludes admission of parol evidence that contradicts the written agreement."*Id.* at 498.

Plaintiff asserts that the contract is invalid because Jeannot fraudulently induced him to enter into the contract by promising to grant him a business interest in the Brookside Inn. " 'Fraud ... makes a contract voidable at the instance of the innocent party." ' *Id.* at 503, quoting 3 Corbin, Contracts, § 580, p 431. "An action for fraud must relate to past or existing facts, not future events. However, an unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman v. Foreman,* 266 Mich.App 132, 143; 701 NW2d 167 (2005). "[F]raud will invalidate a contract when a party's assent to said contract is induced through *justified* reliance upon a fraudulent misrepresentation." *Barclae v. Zarb,* 300 Mich.App 455, 482; 834 NW2d 100 (2013) (emphasis in original). But "[a] merger clause can render reliance unjustified as to agreements, promises or understandings related to performances that are not included in the written agreement." *Id.* "Reliance on pre-contractual representations is unreasonable as a matter of law when the contract contains an integration clause." *Northern Warehousing, Inc v. Dep't of Ed,* 475 Mich. 859 (2006).

***3** "Parol evidence is generally admissible to demonstrate fraud. However, in the context of an integration clause, which releases all antecedent claims, only certain types of fraud would vitiate the contract."*UAW–GM,* 228 Mich.App at 503 (citations omitted)."[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause."*Id.*" 'There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract." ' *Barclae,* 300 Mich.App at 481, quoting *Star Ins Co v. United Commercial Ins Agency, Inc,* 392 F Supp 2d 927, 928–929 (ED Mich, 2005).

In *Hamade v. Sunoco Inc (R & M),* 271 Mich.App 145, 170; 721 NW2d 233 (2006), the plaintiff, who operated a Sunoco gas station under a franchise agreement with the defendant, asked Sunoco's agent to include a clause in the franchise agreement that would prevent Sunoco from operating a second gas station within a certain distance from the plaintiff's station. *Id.* at 149–150. The agent assured the plaintiff that such a clause was unnecessary because Sunoco "would never do that" and the franchise agreement did not contain the clause. *Id.* The agreement contained an integration clause. *Id.* at 152. Sunoco subsequently began operating a second gas station one mile away and the plaintiff sued. *Id* at 150. This Court affirmed summary disposition in favor of the defendant, stating:

> Plaintiff does not contend that he was misled into believing that the 1997 Agreement contained a clause granting him an exclusive territory when in fact it did not. Instead, plaintiff argues that he was induced into entering into an incomplete agreement that described itself as complete. In order to prevail on this theory, plaintiff must show not only that he requested the inclusion of a clause guaranteeing him an exclusive territory, but also that, as a result of Sunoco's fraudulent representations, he was induced to

> forget about the inclusion of that term and sign an agreement that omitted it while describing itself as the parties' entire agreement. [*Id.* at 170.]

Similarly, plaintiff does not assert that he was misled into believing that the lease agreement contained a term granting him a business interest in the Brookside Inn. Instead, plaintiff argues that he was induced into entering an incomplete agreement that described itself as complete—i.e., that although the lease agreement contained express language stating that it was the entire agreement between the parties, plaintiff believed there was a collateral agreement.

In *UAW–GM,* 228 Mich.App at 488, the plaintiff (a labor union) entered into a contract with a hotel company to host a convention. The contract contained a merger clause. *Id.* The plaintiff asserted that there was a collateral, oral agreement that the hotel would be staffed with union-represented employees during the convention, but no such term was included in the written contract.*Id.* at 488–489. The hotel company subsequently sold the hotel to the defendants, who replaced the hotel's unionized staff with a non-union workforce. *Id.* The plaintiff canceled the contract and sued to recover its down payment, *id.*, contending that "[the hotel company's agent's] representations that the hotel would have union employees and her failure to inform plaintiff of the impending sale of the hotel constituted fraud."*Id.* at 504. This Court held that "[t]hese fraud claims turn on an alleged agreement that the hotel employees would be union-represented. However, the merger clause would nullify any such agreement...."*Id.*The Court stated:

> ***4** [T]he merger clause made it unreasonable for plaintiff's agent to rely on any representations not included in the letter of agreement. Any injury suffered by plaintiff appears to have resulted from its agent's failure to include a requirement that hotel employees be union-represented in the integrated letter of agreement rather than from reliance on any misrepresentations...." [*Id.*]

"Thus," the Court concluded, "the allegations in plaintiff's fraud count are not the type of fraud claims that could invalidate a contract with a valid merger clause."*Id.* at 505.

Plaintiff alleges that defendants promised to grant him a business interest in the Brookside Inn. As in *UAW–GM,* plaintiff's reliance on any alleged promises not contained in the written agreement was unreasonable and cannot support a claim for fraud.

Plaintiff's assertion that he was promised additional consideration is not reflected in the written lease agreement. Fraud requires reasonable reliance on a misrepresented fact. *Barclae,* 300 Mich.App at 482. Reliance on an oral promise made prior to entering a fully integrated written agreement is per se unreasonable. *UAW–GM,* 228 Mich.App at 504. Accordingly, the trial court did not err by granting summary disposition on plaintiff's count for rescission of the contract for fraud.

II

Plaintiff next argues that the trial court erred by granting summary disposition of his claims for conversion and claim and delivery on the basis of laches. "[A] trial court's decisions regarding application of the equitable doctrine of laches are reviewed de novo [and] its findings of fact supporting such a decision are reviewed for clear error."*Charter Twp of Shelby v. Papesh,* 267 Mich.App 92, 108; 704 NW2d 92 (2005)."A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."*Kitchen v. Kitchen,* 465 Mich. 654, 661–662; 641 NW2d 245 (2002).

Laches is an equitable defense which can bar a claim where there has been a "passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant."*Lothian v. Detroit,* 414 Mich. 160, 168; 324 NW2d 9 (1982). Plaintiff argues that his claims were legal in nature and governed by the applicable statute of limitations, and that, in the alternative, no bar of laches can arise in equity before the running of the statute of limitations in an analogous legal claim. Conversion is a cause of action for damage to property and is controlled by a three-year statute of limitations. *Tillman v. Great Lakes Truck Center, Inc,* 277 Mich.App 47, 49; 742 NW2d 622 (2007)."Claim and delivery is a civil action to recover (1) possession of goods or chattels which have been unlawfully taken or unlawfully detained, and (2) damages sustained by the unlawful taking or unlawful detention."MCR 3.105. Contrary to defendants' unsupported assertion that "claim and delivery (replevin) is obviously founded in equity," replevin has traditionally been considered a legal remedy for unlawfully retained personal property. See *Alger v.*

Davis, 345 Mich. 635, 643; 76 NW2d 847 (1956); *Lewis J Selznick Enterprises v. Harry I Garson Productions,* 202 Mich. 111, 115; 167 NW 1011 (1918). However, plaintiff is incorrect that laches cannot bar a legal claim. This Court has stated: "[L]aches may bar a legal claim even if the statutory period of limitations has not yet expired."*Tenneco Inc v. Amerisure Mut Ins Co,* 281 Mich.App 429, 457; 761 NW2d 846 (2008).

***5** The trial court ruled as follows:

> In the instant case plaintiff's claim is bared by laches. Defendant purchased the contents of the Brookside in 2011. If plaintiff believed he was entitled to any items in the Brookside, he needed to contest that issue in 2008 when this Court entered a judgment against him. He cannot contest the issue in the present case four years later. Plaintiff had the opportunity to remove any items of personal property.
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> * * *
>
> [T]he Court is well satisfied that with the passage of time and two intervening owners defendant is certainly prejudiced and the equitable remedy of laches applies as against plaintiff's claim.

We perceive no error in this ruling. Eden Brook purchased all the personal property associated with the Brookside Inn in 2011. At plaintiff's request, defendants gave plaintiff three days to remove personal items from the inn. Plaintiff's only response to Jeannot's affidavit was his own affidavit, which states, "I've actually seen items of my property at the Brookside Inn and at an auction organized for Mr. Jeannot and conducted in Interlochen in March 2013 by Cole's Auction Service."The trial court properly ruled that defendants were prejudiced by plaintiff's lack of diligence in pursuing his claim.

Further, even if laches had not barred plaintiff's claims, the trial court correctly granted summary disposition under MCR 2.116(C)(10). The property at issue was clearly subject to the 2008 judgment, and there is no documentary evidence in the record to the contrary. Plaintiff failed to come forward with any admissible evidence of his own tending to show that there remained a genuine issue for trial on his conversion and claim-and-delivery claims.

III

Plaintiff next argues that the trial court erred by awarding sanctions against him and his attorney. "This Court reviews a trial court's finding regarding whether an action is frivolous for clear legal error."*Jerico Const, Inc v. Quadrants, Inc,* 257 Mich.App 22, 35; 666 NW2d 310 (2003).

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made."*In re Costs & Attorney Fees,* 250 Mich.App 89, 94; 645 NW2d 697 (2002)."Not every error in legal analysis constitutes a frivolous position. Moreover, merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position."*Kitchen,* 465 Mich. at 663.

The trial court found both that the primary purpose of the lawsuit was to harass defendants and that plaintiff's legal position was devoid of arguable legal merit. There is no evidence in the record to support the trial court's conclusion that plaintiff's primary purpose was to harass defendants. The court stated, "Well, I think it was harassment. This was-this was property that was foreclosed upon. Plaintiffs had the opportunity to remove any personal property and didn't avail themselves of that."These facts are not relevant to the question of whether plaintiff's primary purpose was harassment. Accordingly, the finding that plaintiff's primary purpose was to harass defendants was clearly erroneous.

***6** However, the court's finding that plaintiff's claim lacked legal merit was warranted. Plaintiff's position that defendant Jeannot orally promised him an interest in the Brookside Inn—when viewed in light of well-established common law that makes clear that when there is an integrated written agreement alleged oral promises are barred by the parol evidence rule and cannot form the basis of a fraud claim—was devoid of legal merit. See *Holton v. Ward,* 303 Mich.App 718, 745; 847 NW2d 1 (2014). Likewise, there was no merit to plaintiff's claims for conversion and claim and delivery. His property was clearly the subject of the 2008 judgment of foreclosure and he provided no evidence to the contrary. Under MCL 600.2591, the court's proper finding that the claims were devoid of legal merit was enough to require the imposition of sanctions.

Plaintiff argues that the trial court erred by sparing defendants the burden of proving the reasonableness of their sanctions award. " '[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." ' *Vittiglio v. Vittiglio,* 297 Mich.App 391, 409; 824 NW2d 591 (2012), quoting *Smith v. Khouri,* 481 Mich. 519, 528–529, 751 NW2d 472 (2008). However, defendants submitted a detailed bill of costs to support their requested sanctions award of $7,852.75 and noted that this covered not only the motion for summary disposition but approximately a year of litigation that included a motion for injunctive relief, discovery that included multiple sets of interrogatories, hearings, and a motion for summary disposition by plaintiff. Citing the *Michigan Bar Journal,* the trial court found that defendants' claimed attorney fee of $200 per hour was "not by any means an unreasonable fee." The trial court did not err by finding that defendants met their burden of proving the reasonableness of their fees.

IV

Plaintiff argues that the trial judge was biased against him. Plaintiff has completely failed to support his claim of judicial bias either with record evidence or with controlling authority. Moreover, he did not preserve the issue. See MCR 2.003(D). The issue being unpreserved, we will reverse only when there is plain error affecting substantial rights. *People v. Carines,* 460 Mich. 750, 774; 597 NW2d 130, 138 (1999). Here, there is no plain error requiring reversal.

Affirmed. Defendants, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

All Citations

Not Reported in N.W.2d, 2015 WL 1931726

Footnotes

1 Defendants' motion for summary disposition was not included in the lower court record in this case but was discovered in the file of a case which had been joined with this case for discovery below. Under the circumstances, we expand the record to include the motion under MCR 7.216(A)(4).

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2015 WL 630259
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MERCANTILE BANK OF MICHIGAN,
Plaintiff/Counter–Defendant/Appellee/Cross–Appellant,
v.
CLMIA, LLC, Defendant/Third–Party Plaintiff/Cross–Defendant/Appellant/Cross–Appellee,
and
Daniel B. Longman, Defendant/Third–Party Plaintiff/Appellant/Cross–Appellee,
and
CLIA, Inc., Defendant,
and
Wells Fargo Bank, N.A., Defendant/Counter-Plaintiff/Cross-Plaintiff/Appellee,
and
Wells Fargo Advisors, LLC, William Ockerlund, and Michael Driver, Third–Party Defendants/Appellees,
and
Wachovia Bank and Wachovia Securities, LLC, Third–Party Defendants.

Docket No. 316777. | Feb. 12, 2015.

Kent Circuit Court; LC No. 09–001639–CZ.

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

Opinion

PER CURIAM.

*1 CLMIA, LLC and Daniel B. Longman appeal as of right the trial court's orders granting summary disposition in favor of Wells Fargo Advisors, William Ockerlund, and Michael Driver on CLMIA's third-party claims against them, denying CLMIA's motion to dismiss Wells Fargo Bank's breach of contract claim against it, and granting summary disposition in favor of Mercantile Bank and against CLMIA and Longman for breach of contract. Mercantile Bank cross-appeals as of right from the trial court's order granting CLMIA's motion for summary disposition in its favor as to Mercantile's equitable claims against CLMIA. We affirm.

In 2006, Daniel Longman, owner of CLMIA, LLC (a marine insurance agency) met William Ockerlund ("Ockerlund") and Michael Driver ("Driver"), stockbrokers who were employed by Wells Fargo Advisors, LLC (f/k/a Wachovia Securities, LLC) and they advised and assisted him in obtaining financing to purchase a marina in Florida. Longman obtained the financing through the purchase of variable rate bond securities in the amount of $6,150,000. In November 2006, the bond sale took place with Mercantile Bank of Michigan ("Mercantile") providing a letter of credit in support of the bonds and Longman signing a personal guarantee to Mercantile.

Approximately one month after the sale of the variable rate bonds, Driver recommended that CLMIA enter into an interest rate swap agreement as a purported way to "fix" the interest rate on the bonds. Acting upon this advice, CLMIA executed a Master Swap Agreement with Wachovia Bank (later known as Wells Fargo Bank and which shall hereafter be referred to as "Wells Fargo") in December 2006. Under the Master Swap Agreement, Mercantile was to act as a credit support provider (defined in the swap agreement as "each party to a Credit Support Document that provides or is obligated to provide security, a guaranty or other credit support for [CLMIA's] obligations under this Agreement, including, without limitation, Mercantile Bank of Michigan") for CLMIA in any swap transactions entered into by Wells Fargo and CLMIA pursuant to the agreements. At the same time, and unbeknownst to CLMIA, Mercantile also executed a "Master Swap Participation Agreement" with Wells Fargo obligating it to pay Wells Fargo any amounts that CLMIA became required to pay under the swap transactions but failed to pay.

Wells Fargo and CLMIA immediately entered into a swap transaction under the terms of the Master Swap Agreement and from December 2006 to June 2007 the swap transaction resulted in monthly payments of approximately $1,000 from Wells Fargo to CLMIA. The swap transaction was terminated around June 2007, and CLMIA received a termination fee, as required under the Master Swap Agreement, from Wells Fargo. Driver then recommended that CLMIA enter into another swap transaction with Wells Fargo in August of 2007 and CLMIA agreed. This transaction was not profitable to CLMIA and resulted in CLMIA paying significant monthly amounts to Wells Fargo. In the spring of 2008, CLMIA indicated to Driver that it wanted to terminate the swap transaction and was advised that it could not do so without paying a significant termination fee to Wells Fargo. According to CLMIA, it still wanted to terminate the swap transaction and advised Driver of the same. In November 2008, Longman advised Wells Fargo that it would no longer be making the monthly swap transaction payments owed. Rather than terminate the contract, or accept CLMIA's termination, however, Wells Fargo accepted the monthly payments from Mercantile that CLMIA failed to make.

***2** Mercantile thereafter initiated this action against CLMIA and Longman seeking repayment of the monies it had paid to Wells Fargo under its Master Swap Participation Agreement on theories of subrogation, reimbursement, exoneration rights as guarantor and subrogee, and breach of guaranty. Mercantile further sought enforcement of its indemnification rights against CLMIA, and pursued claims of unjust enrichment and implied contract and sought a declaration that Mercantile is entitled to be subrogated to Wells Fargo's current and potential right to future payments.

On CLMIA and Longman's motion, the trial court granted summary disposition in favor of CLMIA with respect to the equitable relief sought in Mercantile's complaint (equitable subrogation, equitable indemnification, unjust enrichment, and implied contract) and further granted summary disposition in favor of Longman, but allowed Mercantile to amend its complaint. In its amended complaint, Mercantile claimed breach of contract, and sought declaratory relief regarding the breach of contract and the guaranty obligations of Longman.

CLMIA filed a third-party complaint against Wells Fargo, Wells Fargo Securities, LLC, Ockerlund, and Driver alleging fraud, fraudulent inducement, negligent misrepresentation, negligence per se, and breach of fiduciary duty. Wells Fargo filed a counter-complaint against Mercantile and a cross-claim against CLMIA. In its counter-complaint, Wells Fargo asserted that CLMIA did not make payments as it was supposed to under the Master Swap Agreement and swap transaction and that Wells Fargo terminated the agreement on August 24, 2010. Wells Fargo claimed that according to the participation agreement, Mercantile is obligated to pay CLMIA's termination amount to Wells Fargo, which is $624,656.46 and that it did not pay the same, thus breaching its contract with Wells Fargo. In its cross-claim against CLMIA, Wells Fargo asserted that CLMIA's failure to pay the termination amount set forth in the Master Swap Agreement amounts to a breach of contract.

The trial court ultimately dismissed all of CLMIA's third-party claims against Wells Fargo, Wells Fargo Securities, LLC, Ockerlund, and Driver. The trial court further determined that the Master Swap Agreement was valid and enforceable, that an "event of default" under the definition set forth in Master Swap Agreement was CLMIA's nonpayment of the August 2010 monthly payment due under the relevant swap transaction and that August 24, 2010, was the early termination date of the Master Swap Agreement. The trial court also declared that when CLMIA and Longman failed to tender the amounts due after notified by Wells Fargo, Mercantile became obligated to pay the same. Upon payment by Mercantile of the swap liabilities, Wells Fargo would be obligated to assign to Mercantile all of its rights under the swap agreement. The trial court gave the parties 30 days upon which to agree to the actual amount of the swap liabilities owed.

***3** After extensive briefing concerning the swap transaction early termination fee calculation, the trial court entered an order setting forth the termination fee under the master swap agreement as $624,656.46 plus interest of $11,724.73 and ordering CLMIA to pay Wells Fargo the same. Under the order, if CLMIA did not pay the amount ordered, Mercantile was to pay the fees and Wells Fargo was to assign all of its rights under the swap to Mercantile. Mercantile was thereafter substituted for Wells Fargo given that Wells Fargo had assigned its rights under the Master Swap Agreement to it and Longman had executed an amended and restated guaranty in favor of Mercantile. The trial court thereafter entered a judgment in favor of Mercantile and against CLMIA and Longman, jointly and severally, in the amount of $624,656.46 plus $11,724.73 interest.

CLMIA and Longman's Appeal

On appeal, CLMIA first argues that the trial court erred in granting summary disposition in favor of Ockerlund and Driver on CLMIA's third-party claims of fraud against them. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v. Kleiman,* 447 Mich. 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v. Dep't of Corrections,* 215 Mich.App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.*

Pursuant to MCR 2.112(B)(1), "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.""Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation."*Titan Ins. Co. v. Hyten,* 491 Mich. 555; 817 NW2d 562 (2012). These include, among others, fraudulent misrepresentation (actionable fraud), innocent misrepresentation, and silent fraud, all of which contain separate elements. *Id.* at 557. As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc. v. W.B. McConkey,* 231 Mich.App 22, 27; 585 NW2d 33 (1998). Further, an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact; future promises are contractual in nature and do not constitute actionable fraud. *Kamalnath v. Mercy Memorial Hosp. Corp.,* 194 Mich.App 543, 554; 487 NW2d 499 (1992); *Hi–Way Motor Co. v. Int'l Harvester Co.,* 398 Mich. 330, 336; 247 NW2d 813 (1976).

***4** In its third-party complaint, CLMIA asserted that "[a]fter Longman, on behalf of Charter lakes, executed the Master Swap Agreement and Schedule of Master Swap Agreement, Driver [and Ockerlund] made material representations to Longman regarding the referenced Swap Agreement. Driver [and Ockerlund] made these misrepresentations to Longman and Charter Lakes with knowledge that said representations were false, or were made with reckless disregard of the truthfulness of the statements."CLMIA further alleged that the representations "which are specified in the factual circumstances pled above" were, in fact, false, and that Longman and CLMIA acted in reliance on the representations and were harmed as a result. The complaint contained a "factual allegations" sections indicating that Ockerlund and Driver acted as financial advisors to CLMIA. According to the complaint, Driver faxed Longman two pages of a Master Swap Agreement with Wells Fargo to sign and he did so, without receiving the remaining pages of the agreement until 18 months later. CLMIA alleged in the complaint that it entered into the Swap Agreement based solely on the advice of Driver and Ockerlund and on their representations that CLMIA would likely benefit from the agreement, that its risk of financial exposure was minimal, that it would only have to pay sums to the bank if CLMIA effected an early termination under the agreement, and that they would watch over the accounts and could unwind the agreement if CLMIA had to pay too much, when, in fact, none of the above were true.

As indicated by the trial court, CLMIA did not specify any particular statements that Ockerlund or Driver made *after* the Master Swap Agreement was entered into and upon which CLMIA relied. All identified statements were statements made prior to the execution of the swap agreement. Because CLMIA has set forth a separate claim for fraudulent inducement, that type of fraud is not at issue in the claims presented here and entitled simply "fraud." CLMIA's reference to an allegation in its complaint wherein it asserted that if Ockerlund and Driver had disclosed the actual terms and potential risk of entering into the swap agreement, CLMIA would not have entered into the swap agreement is relevant only to its fraudulent inducement claim. Similarly, CLMIA's reference to allegations in its complaint that Ockerlund and Driver were fiduciaries and thus CLMIA reasonably relied upon their representations is relevant only to its separately pleaded breach of fiduciary duty claims.

CLMIA must have pleaded all of the necessary elements of some type of fraud other than fraud in the inducement in these counts to survive summary disposition. CLMIA realizes as much, having predicated these fraud claims on statements made "[a]fter Longman, on behalf of Charter lakes, executed the Master Swap Agreement and Schedule of Master Swap Agreement ...." Yet, CLMIA's general allegations appear to relate solely to its entry into the Master Swap Agreement in the first place. As noted by the trial court, CLMIA could not have reasonably relied on statements made to it *after* the swap agreement was entered into when deciding whether to enter into the swap agreement in the first place. Lacking identification of any post-execution statements made by Ockerlund and Driver in these counts, CLMIA has failed to establish that it acted in reliance on any such statements sufficient to meet element (5) of a fraudulent misrepresentation claim. *M & D, Inc.,* 231 Mich.App at 27.

***5** While CLMIA relates, in a single paragraph, that false representations were made after the Master Swap

Agreement was executed and refers to statements produced and transcribed during discovery, third-party defendants' motion was based upon MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone.*Patterson,* 447 Mich. at 432. Reference to anything produced during discovery is thus inappropriate and irrelevant. The trial court's ruling was based on the pleadings alone.

The trial court indicated that CLMIA's position appeared to be that third-party defendants were liable for silent fraud because they did not disclose at a July 2008 meeting that the prior misrepresentations created an automatic right to terminate the agreement and further failed to disclose that the agreement was "materially flawed." To prove silent fraud, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure.*Lucas v. Awaad,* 299 Mich.App 345, 363–364; 830 NW2d 141(2013)."A plaintiff cannot merely prove that the defendant failed to disclose something; instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive."*Id.* at 364 (internal quotation omitted). And, as with other types of fraud, silent fraud requires reasonable reliance by the defrauded party. See *UAW–GM Human Resource Ctr. v. KSL Recreation Corp.,* 228 Mich.App 486, 504; 579 NW2d 411 (1998).

Assuming, without deciding, that third-party defendants had a duty to disclose that they made prior misrepresentations to third-party plaintiffs and that such misrepresentations created a right to terminate the agreement, or that the agreement was flawed and was unenforceable, not only did third-party plaintiffs fail to specifically plead that they relied on these misrepresentations, but they cannot establish that they did. To prove that they relied on the misrepresentations, third-party plaintiffs would necessarily have to show that they did not terminate the agreement, i.e., that they continued with the agreement because they relied on third-party defendants withholding of information that third-party plaintiffs could terminate the agreement. According to third-party plaintiffs, however, at the July 2008 meeting and afterwards, they indicated their intent to terminate the agreement to third-party defendants and Wells Fargo Bank. This termination was, according to third-party plaintiffs, simply not recognized by third-party defendants or Wells Fargo Bank. Thus reasonable reliance cannot be demonstrated.

Because CLMIA asserted in its third-party complaint that it was given only two pages of the Master Swap Agreement to sign, it could perhaps be claimed that CLMIA's fraud claims against Ockerlund and Driver were based upon fraud in the execution. Fraud in the execution occurs when a party does not know the contents of the instrument. *Stefanac v. Cranbrook Ed Community,* 435 Mich. 155, 165–166; 458 NW2d 56 (1990). This type of fraud occurs when the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the signatory relied on this fraud to his detriment. *Paul v. Rotman,* 50 Mich.App 459, 463–464; 213 NW2d 588 (1973). All fraud requires that a plaintiff establish reasonable reliance on an alleged material misrepresentation. *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co,* 280 Mich.App 16, 39; 761 NW2d 151 (2008). And, "[t]here can be no fraud where a person has the means to determine that a representation is not true."*Nieves v. Bell Industries, Inc.,* 204 Mich.App 459, 464; 517 NW2d 235 (1994)."As this Court has explained, that general rule is only applied when the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed."*Alfieri v. Bertorelli,* 295 Mich.App 189, 195; 813 NW2d 772 (2012)(quotation and citation omitted).

***6** Here, the fact is that Longman signed an agreement for CLMIA allegedly without reading it or understanding the transaction. He had already received the financing that he sought for the marina through variable rate bonds. He did not have to agree to the interest rate swap agreement. Longman claims that he was faxed only the signature pages of the agreement to sign. However, the first signature page containing Longman's signature bears page number "18" at the bottom. The second signature page bears the page number "8" at the bottom. Clearly, then, these were lengthy documents. The length of the documents was an indication that further inquiry was needed. *Alfieri,* 295 Mich.App at 195. This Court has held that "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v.. Christensen,* 126 Mich.App 640, 645; 337 NW2d 611, (1983). A related and equally settled principle of Michigan contract law is that "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms."*Shay v. Aldrich,* 487 Mich. 648, 680–681; 790 NW2d 629 (2010) (citation omitted). Moreover, while Longman claims to have received only the two signatory pages of the documents, the entire Master Swap Agreement was attached as an exhibit to CLMIA's appeal brief, was signed by Longman on December 1, 2006, and contains what appears to be facsimile stamps on the top of each page containing the name "CHARTER LAKES INSURANCE" as well as the date of "Dec–04–2006" and a time. This indicates that CLMIA did receive the entirety of the Master Swap Agreement. The trial court properly dismissed the fraud claims against Ockerlund and Driver.

Because the fraud claim against Wells Fargo Bank is based only upon its "review and ratification" of the misrepresentations by Ockerlund and Driver, a failure of the fraud claims against those third-party defendants requires a failure of the fraud claim against Wells Fargo Bank. The trial court thus properly dismissed this claim as well.

CLMIA and Longman next claim that the trial court erred in dismissing their negligent misrepresentation claim against Ockerlund, Driver, and Wells Fargo Advisors. We disagree.

"A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care."*Unibar Maintenance Servs., Inc. v. Saigh,* 283 Mich.App 609, 621; 769 NW2d 911 (2009) (citations and quotation marks omitted). Our Supreme Court has defined "duty" as a "question of whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other."*Brown v. Brown,* 478 Mich. 545, 552–553; 739 NW2d 313 (2007)(internal citation omitted). According to *Brown,* "duty" is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."*Id.* Whether a duty exists depends on (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of the connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach.*Rakowski v.. Sarb,* 269 Mich.App 619, 629; 713 NW2d 787 (2006).

*7 This negligent misrepresentation theory of relief is a means for holding a party liable for the negligent performance of a contract to third parties who are foreseeably injured by the negligent performance. See *Williams v. Polgar,* 391 Mich. 6, 20–23, 215 NW2d 149 (1974). Again, however, "[t]here can be no fraud where a person has the means to determine that a representation is not true,"*Nieves,* 204 Mich.App at 464, such as "when the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed."*Alfieri,* 295 Mich.App at 195.

The trial court dismissed the negligent misrepresentation claims against Ockerlund, Driver, and Wells Fargo Advisors under MCR 2.116(C)(8) without analysis or explanation.

In their specific claim for negligent misrepresentation, CLMIA and Longman alleged that:

> 76. Wachovia Bank, Wachovia Securities, Ockerlund, and Driver made and/or adopted or ratified material misrepresentations regarding the referenced Swap Agreement before and after its execution to Longman and [CLMIA] with negligent disregard for the truthfulness of the statements.
>
> 77. These representations, which are specified in the factual circumstances plead above, are in fact false.
>
> 78. Longman acted in reliance on these material misrepresentations of fact when he executed the last page of the Master Swap Agreement and the Schedule to the Master Swap Agreement on behalf of Charter Lakes.
>
> 79. Charter Lakes, as a result of acting on the negligently made material misrepresentations of the Third-party Defendants, has incurred damages ....

In their factual allegations, CLMIA and Longman asserted that Driver and Ockerlund acted as their financial advisors, and represented that they could stabilize the rate of the variable rate bonds by way of a swap agreement. They further alleged that Ockerlund and Driver advised that Charter Lakes "would likely benefit from the contract and that the agreement did not impose an undue financial risk" and assured Longman that "Charter Lakes would not suffer significant losses under the Swap Agreement," indicating that, at most, Charter Lakes would have to pay around $2,000 per month and that Ockerlund and Driver would unwind the swap if it proved unbeneficial. CLMIA and Longman alleged that contrary to the representations, the swap agreement did and has exposed Charter Lakes to significant financial risk (i.e., Charter Lakes' liability to Wachovia Bank). They also alleged that:

> 41. Ockerlund, Driver, and Wachovia Securities, as the fiduciaries for Charter Lakes, had an obligation to assure that the conditions required under the contract to enter into the Swap Agreement were complied with and failed to do so.
>
> 42. These provisions were material to Charter Lake's

best interests and [third-party defendants] all acted in concert to deprive Charter Lakes of these protections in order to obtain its participation in the Swap Agreement.

***8** No party has directed this Court to authority indicating that a financial advisor who has no control over a client's money has a fiduciary duty to a client. Under New York law, (which the Master Swap Agreement states is to be applied, but which the parties often ignore), it has been held that professionals, such as investment advisors, who owe fiduciary duties to their clients may be subject to tort liability for failure to exercise reasonable care. *Bullmore v. Ernst & Young Cayman Is.*, 45 AD3d 461, 463 (1st Dept 2007). However, it appears that only a financial advisor with discretionary authority to manage a client's investment accounts owes a fiduciary duty to the client. See, *Brooks v. Key Trust Co. Natl Assn*, 26 AD3d 628, 630 (3d Dept 2006). There has been no such allegation here.

Even assuming that third-party defendants were acting in the official capacity of financial advisors when they spoke to CLMIA and Longman concerning the interest swap, and assuming, without deciding, that they could be deemed to owe a fiduciary duty to CLMIA and Longman, we must still examine the statements attributed to third-party defendants as misrepresentations to determine whether they were prepared without reasonable care and whether CLMIA and Longman justifiably relied on the same to their detriment.

CLMIA and Longman's allegations that Ockerlund and Driver's statements that Charter Lakes "would likely benefit from the contract and that the agreement did not impose an undue financial risk" are not actionable as they are expressions of opinion or salesman's talk in promoting a sale, i.e., puffery. Expressions of opinion are not false statements of independently verifiable facts. *Mable Cleary Trust v. Edward–Marlah Muzyl Trust*, 262 Mich.App 485, 502; 686 NW2d 770 (2004). An action for fraud cannot be predicated upon an expression of opinion or upon puffery. *Van Tassel v. McDonald Corp.*, 159 Mich.App 745, 750; 407 NW2d 6 (1987); *High Tides, LLC v. DeMichele*, 88 AD 3d 954, 958; 931 N.Y.S.2d 3771 (2011). The statements likewise concerned future events. In general, an action for fraud cannot be based on the failure of future events to transpire as represented or predicted. See *Foreman v. Foreman*, 266 Mich.App 132, 143; 701 NW2d 167 (2005); *Marrero v. McDonnell Douglas Capital Corp.*, 200 Mich.App 438, 444; 505 NW2d 275 (1993); *Cerabono v. Price*, 7 AD3d 479, 480 (2nd Dept 2004) ("[t]he general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct").

The same holds true for statements that Charter Lakes would not suffer significant losses under the Master Swap Agreement. The alleged misrepresentation that third-party defendants would monitor interest rates and unwind the swap agreement if it appeared Charter Lakes would have to pay an interest rate differential and that, at most, Charter Lakes would have to pay around $2,000 per month, concerned future events and thus were not actionable.*Foreman*, 266 Mich.App at 143; *Marrero*, 200 Mich.App at 444.

***9** Additionally, CLMIA and Longman did not allege that any of the alleged misrepresentations were based upon on "information prepared without reasonable care" by third-party defendants. *Unibar Maintenance Servs, Inc.*, 283 Mich.App at 621. There is no assertion, for example, that third-party defendants had the means to determine whether the representations were true, any more than CLMIA and Longman did, and failed to undertake the proper determination as to the truth of their representations or that they did not, in fact, ascertain whether the representations were true when made. Some intervening circumstance could, after all, have made the perhaps once-true representations false (a change in the market, etc.).

Finally, as previously indicated, Longman signed the Master Swap Agreement for CLMIA, binding it to the terms, without reading it. Having only allegedly received two pages, one bearing a page "18" and one bearing a page "8", Longman was on notice that that the documents were lengthy and that was a clear indication that further inquiry was needed. *Alfieri*, 295 Mich.App at 195. CLMIA and Longman's reliance on *any* representations made by third-party defendants concerning the Agreement's terms, the risks it posed, etc ., when Longman did not read the Agreement and was aware that it was lengthy, vitiates a claim of reasonable reliance. This is particularly so, given that the Master Swap Agreement was between CLMIA and *Wells Fargo Bank*-not third-party defendants. Had CLMIA and Longman required further information concerning the Agreement's terms, the best provider of information, including a copy of the entirety of the Agreement they claimed they did not originally receive, would have been Wells Fargo Bank. The trial court properly dismissed the third-party claim of negligent misrepresentation.

CLMIA and Longman next assert that the trial court erred in finding that the swap agreement at issue was unrelated to a security and in dismissing CLMIA's claim for negligence per se based on violations of the Michigan

Uniform Securities Act. We disagree.

A plaintiff may establish negligence per se by proving that a defendant violated a statutory duty. *McKinney v. Anderson,* 373 Mich. 414, 419; 129 NW2d 851 (1964). For a court to determine that a statutory violation amounted to negligence per se certain elements must exist. (1) The statute must be "intended to protect against the result of the violation," (2) the plaintiff must be "within the class intended to be protected by the statute," and (3) the statutory violation must be a proximate cause of the plaintiff's injury.*Klanseck v. Anderson Sales & Serv., Inc.*, 426 Mich. 78, 87; 393 NW2d 356 (1986).

In their claim of negligence per se against Ockerlund and Driver, CLMIA and Longman alleged that these third-party defendants were "investment advisors" as defined in the Michigan Uniform Securities Act ("MUSA") and that they violated MCL 451.502[1] (now MCL 451.2501). CLMIA and Longman alleged that these statutory violations created a presumption of negligence per se. The trial court, however, opined that both the definition of investment advisor under MUSA and MCL 451.502 require the involvement of a security in the transaction and that the swap agreement is not a security such that the MUSA is inapplicable. We agree.

***10** Under the MUSA, at MCL 451.2102a:

> (e) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include any of the following:
>
> (*i*) An investment adviser representative.
>
> (*ii*) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession.
>
> (*iii*) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice.
>
> (*iv*) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation.
>
> (*v*) A federal covered investment adviser.
>
> (*vi*) A depository institution.
>
> (*vii*) Any other person that is excluded by the investment advisers act of 1940 from the definition of investment adviser.
>
> (*viii*) Any other person excluded by rule or order under this act.
>
> (*ix*) A finder registered as a broker-dealer under this act.

The former version of this rule (relied upon by the trial court) defined "investment adviser" at MCL 451.801(l) as "any person who, for consideration, engages in the business of advising others, either directly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, who, for consideration and as part of a regular business, issues or promulgates analyses or reports concerning securities, or who acts as a finder in conjunction with the offer, sale or purchase of a security...." Excluded from this definition is a "broker-dealer or registered agent acting on behalf of a broker-dealer whose performance of these services is solely incidental to the conduct of his or her business as a broker-dealer and who receives no special compensation for the services."MCL 451.801(l)(3).

MCL 451.502(a)(1) and (2) prohibited an investment advisor from employing a device, scheme, or artifice to defraud a client or prospective client or to engage in an act, practice, or course of business that operates or could operate as a fraud or deceit upon a client or prospective client. MCL 451.2501 represents the prior MCL 451.502 and provides:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, to directly or indirectly do any of the following:
>
> ***11** (a) Employ a device, scheme, or artifice to defraud.
>
> (b) Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
>
> (c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit on

another person.

MCL 451.2502 similarly provides:

(1) It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities, to do any of the following:

(a) Employ a device, scheme, or artifice to defraud another person.

(b) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

The MUSA currently defines security as follows:

(c) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of that put, call, straddle, option, or privilege on that security, certificate of deposit, or group or index of securities; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; an investment in a viatical or life settlement agreement; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. All of the following apply to the term security:

(*i*) The term includes a contractual or quasi-contractual arrangement that meets all of the following:

(A) A person furnishes capital, other than services, to an issuer under the arrangement.

(B) A portion of the capital furnished under sub-subparagraph (A) is subjected to the risks of the issuer's enterprise.

(C) The furnishing of capital under sub-subparagraph (A) is induced by representations made by an issuer, promoter, or the issuer's or promoter's affiliates which give rise to a reasonable understanding that a valuable tangible benefit will accrue to the person furnishing the capital as a result of the operation of the enterprise.

(D) The person furnishing the capital under sub-subparagraph (A) does not intend to be actively involved in the management of the enterprise in a meaningful way.

***12** (E) At the time the capital is furnished, a promoter or its affiliates anticipate that financial gain may be realized as a result of the furnishing.

(*ii*) The term includes both a certificated and an uncertificated security.

(*iii*) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

(*iv*) The term does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974.

(*v*) The term includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. As used in this subparagraph, a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.
(*vi*) The term may include, as an investment contract, an interest in a limited partnership, a limited liability company, or a limited liability partnership. MCL 451.2102c

"Security" was previously defined, in part, at MCL 451.801(z) as:

> [A]ny note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; certificate of interest or

> participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security", or any certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

As noted by the trial court, all of the elements of negligence per se pleaded by third-party plaintiffs require, at their core, the involvement of a security. Clearly, the MUSA does not include a swap transaction of any kind in its definition of "security." The MUSA substantially tracks the language of the Uniform Securities Act (*People v. Dempster,* 396 Mich. 700, 704; 242 NW2d 381 (1976)), which is a model law authored in 1956 by the National Conference of Commissioners on Uniform State Laws, a group of state legislators, judges and legal scholars. *Bennett v. Durham,* 683 F 3d 734, 736 (CA 6 2012). The Uniform Securities Act similarly does not include the term "swap" in its definition of "security." See Unif Securities Act 2002 § 102(28). The Uniform Securities Act, in turn, "is borrowed substantially" from the Securities Act of 1933. *Bennett,* 683 F 3d 734 at 737. This is notable because, the Securities Act of 1933, at 15 USC § 77b(a)(1) defines "security" as "any note, stock, treasury stock, security future, *security-based swap....*" (emphasis added). Thus, it can be inferred that if a swap agreement of any kind were intended to be included within the meaning of a security, that specific term would have been included within the MUSA's (and the Uniform Security Act's) definition. Its conspicuous absence leads to the conclusion that a swap agreement was not intended to be considered a security for purposes of MUSA.

***13** That being the case, CLMIA and Longman's assertion that third-party defendants were liable for negligence per se because they violated MCL 451.2501 (the prior MCL 451.502) fails to state claim for which relief could be granted. That statute prohibits a person from engaging in certain acts "in connection with the offer, sale, or purchase of a security...." The swap agreement was not a security under the relevant definition and third-party defendants thus could not have violated this statute with respect to the swap agreement.

As pointed out by CLMIA, a bond falls within the MUSA's statutory definition of a security and the notional value in the swap agreement at issue was based upon the value of CLMIA's bonds. However, that does not mean that the swap agreement at issue was a "security based swap." New York law indicates that security-based swap agreements are "privately negotiated contracts that provide for the exchange of payments based on the value of the securities, and the transfer of the financial risks associated with changes in the value of the securities without the conveyance of any ownership interest."*Viking Global Equities, LP v. Porsche Automobil Holding,* 36 Misc.3d 1233 (2012)(r'vsed on other grounds). Under this definition, the payment exchange and the transfer of financial risk are associated with changes in the value of the security. While the notional value in this case was based on the bonds (i.e., security, according to CLMIA), the payment exchange was not based on the value of the bonds and there was no transfer of financial risk associated with a change in the value of the bonds. The bonds had already been issued in a separate transaction, any risk associated with the value in the bonds stayed with CLMIA, and even if CLMIA paid off the bonds in full, the swap agreement would remain in full force. In addition, the payment exchange was always based on the fixed rate set forth in the swap agreement. The variable rate was based on the LIBOR, which fluctuated, and was the only factor that changed the payment amount. This was thus not a security based swap.

CLMIA and Longman next claim that the trial court erroneously dismissed CLMIA's claims for fraudulent inducement and breach of fiduciary duty against Ockerlund, Driver, and Wells Fargo Advisors. We disagree.

"Fraud in the inducement ... addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct .... " *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.,* 209 Mich.App 365, 373, 532 NW2d 541 (1995). It arises where "the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." *Id.* at 373.

To prove a claim of fraud in the inducement, a plaintiff must establish the following elements: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage."*Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,* 276 Mich.App 146, 161; 742 NW2d 409 (2007).

***14** Although not explicitly stated as such, Michigan caselaw appears to support the premise that a fraud in the inducement claim is applicable only to the parties to a contract. For example, when explaining why the economic loss doctrine does not apply to a fraudulent inducement claim, *Huron Tool and Engineering Co.,* 209 Mich.App at 372, stated, "[f]raud in the inducement presents a special situation where parties to a contract appear to negotiate freely-which normally would constitute grounds for invoking the economic loss doctrine-but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by *the other party's* fraudulent behavior."(emphasis added).

New York caselaw, on the other hand, which is supposed to govern the Master Swap Agreement, supports a contrary conclusion. "A misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud."*Selinger Enters, Inc. v. Cassuto,* 50 AD3d 766, 768 (2008); *WIT Holding Corp. v. Klein,* 282 A.D.2d 527, 528 (2001). This cause of action is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who were not parties to the contract, and seeks compensatory damages which are not recoverable for breach of contract.*Selinger Enters, Inc.* 50 AD3d at 768.

In any event, regardless of any representation made by Ockerlund or Driver, Longman signed the Master Swap Agreement and corresponding schedule. The Agreement provides, at paragraph 9.(a) that "This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto."The schedule to the Master Swap Agreement further provides at part 5. (c)(i):

> **Relationship Between Parties.**Each party will be deemed to represent to the other party on the date on which it enters into a Relevant Agreement that:
>
> (1) *Non–Reliance.*It is acting for its own account, and it has made its own independent decisions to enter into the Relevant Agreement and as to whether the Relevant Agreement is appropriate or proper for it based solely upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party or any of its affiliates (or its respective representatives) as investment advice or as a recommendation to enter into the Relevant Agreement, it being understood that information and explanations related to the terms and conditions of any Relevant Agreement will not be considered investment advice or a recommendation to enter into the Relevant Agreement. No communication (written or oral) received from the other party or any of its affiliates (or its respective representatives) will be deemed to be an assurance or guarantee as to the expected results of the Relevant Agreement.
>
> ***15** (2) *Assessment and Understanding.*It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Relevant Agreement based solely upon its own evaluation of the Relevant Agreement (including the present and future results, consequences, risks, and benefits thereof, whether financial, accounting, tax, legal, or otherwise) or that of its own advisers. It is also capable of assuming, and assumes, the risks of the Relevant Agreement. It also understands that the terms under which any Transaction may be terminated early are set forth in this Agreement (or in the relevant Confirmation), and any early termination of a Transaction other than pursuant to such terms is subject to mutual agreement of the parties confirmed in writing, the terms of which may require one party to pay an early termination fee to the other party based upon market conditions prevailing at the time of early termination.
>
> (3) *Status of Parties.*The other party is not acting as a fiduciary for an adviser to it in respect of the Relevant Agreement, and any agency, brokerage, advisory or fiduciary services that the other party (or any of its affiliates) may otherwise provide to the party (or any of its affiliates) excludes the Relevant Agreement.

The above agreement was entered into between Wachovia Bank and CLMIA (through Longman). It is undisputed that Ockerlund and Driver were employed by Wachovia Securities, LLC at the time the agreement was entered into. In Wachovia Corporation's 2006 annual report submitted to the SEC, Wachovia Securities, LLC is identified as Wachovia Corporations "retail securities brokerage subsidiary." Wachovia Bank is identified as its "primary banking affiliate." Black's Law Dictionary (7th ed.) defines "affiliate" as "a corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation.""Affiliate" is also defined in section 14 of the Master Swap Agreement as "subject to the Schedule, in relation to any person, any entity controlled, directly or indirectly, by the person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, 'control' of any entity or person means ownership of a majority of the voting power of the entity or person."

CLMIA and Longman, in fact, alleged in their complaint that Wachovia Securities was a "wholly owned subsidiary of Wachovia Bank ."Under any pertinent definition, Wachovia Securities was an affiliate of Wachovia Bank. And, CLMIA and Longman alleged that Ockerlund and Driver were employees or agents of Wachovia Securities. By signing the agreement, Longman expressly agreed, on behalf of CLMIA, that he was not "relying on any communication (written or oral) of [Wachovia Bank] or any of its affiliates (or its respective representatives) as investment advice or as a recommendation to enter into the Relevant Agreement ....“

***16** Because Longman affirmatively disclaimed that he acted under the advice of any affiliate of Wells Fargo in entering into the agreement, his claims of fraudulent inducement and breach of fiduciary duty fail. "It is beyond cavil that one cannot sign a writing explicitly disclaiming reliance on representations not contained in a contract and later aver that the court should disregard such a disclaimer ... a claim for fraud is barred by the existence of a specific disclaimer and failure to exercise reasonable diligence."*Holzer v. Mondadori,* 40 Misc.3d; 980 N.Y. S2d 276 (2013).

Even absent the disclaimer, the statements attributed to Ockerlund and Driver and which CLMIA and Longman assert were false statements were, as previously indicated, expressions of opinion, puffery, and concerned future events. An action for fraud cannot be predicated on any of these. *Van Tassel,* 159 Mich.App at 750; *Foreman,* 266 Mich.App at 143; *Marrero,* 200 Mich.App at 444; *High Tides, LLC,* 88 AD 3d at 958.

The breach of fiduciary duty claim was also properly dismissed, even in the absence of the disclaimer. CLMIA and Longman contend that because third-party defendants were not parties to the Master Swap Agreement, Michigan law should apply to analysis of this issue. A fiduciary duty arises when the relationship between two parties is "of such character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith."*Portage Aluminum Co. v. Kentwood Nat'l Bank,* 106 Mich.App 290, 294; 307 NW2d 761 (1981); see also *The Meyer & Anna Prentis Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute,* 266 Mich.App 39, 43; 698 NW2d 900 (2005). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Id.* Examples of fiduciary relationships are attorneys to clients, doctors to patients, trustees to beneficiaries, and guardians to wards. *Portage,* 106 Mich.App at 294. Third-party plaintiffs have identified no Michigan law indicating that an investment advisor owes a fiduciary duty to a client.

And, if third-party defendants owed fiduciary duties to CLMIA and Longman, they failed to establish a material question of fact that third-party defendants breached these duties. CLMIA and Longman do not particularize how the recommendation to enter into the swap agreement constituted a deviation from the standard of care owed by an investment advisor. It cannot be ignored that Longman signed the Master Swap Agreement in December 2006 and that a swap transaction thereafter ensued from that date until July of 2007. CLMIA profited from the transaction due to prevailing interest rates and made no complaint. That transaction was terminated and Wells Fargo paid him a termination fee. CLMIA then entered into *another* swap transaction in August 2007 with Wells Fargo and it was only when interest rates were unprofitable to it and CLMIA had to start paying Wells Fargo money on a monthly basis that Longman raised objections and questions to the Master Swap Agreement. The original Master Swap Agreement governed both transactions.

***17** In a November 27, 2007, recorded conversation with Driver, Longman stated that he had been watching interest rates and it did not look good. He said they were going to have to wait and it might turn around at the end of the year but if they "closed that position out" it would cost a lot of money. Longman stated that he thought the bond was going to go back up and when it did, he wanted to get out of the swap and that he just hoped they could get out of it with minimal losses. Longman, then, clearly understood the volatile nature of the market and the fact that there were risks involved. There is no indication that Driver did not act for the benefit of Longman in recommending the interest rate swap when he did, in 2006. The claims of breach of fiduciary duty were appropriately dismissed pursuant to MCR 2.116(C)(10).

CLMIA and Longman next argue that Wells Fargo waived its cross-claim against CLMIA for breach of contract when it elected to continue to behave as though no breach had occurred for a period of 21 months and that the trial court thus erred in denying CLMIA's motion to dismiss Wells Fargo's breach of contract claim against it. We disagree.

Wells Fargo's breach of contract claim against CLMIA was premised upon CLMIA's failure to pay an August 2010 payment and the resulting termination fee allegedly owed under the terms of the Master Swap Agreement. CLMIA, however, asserted that because it breached the contract in December 2008 when it stopped paying the monthly payments owed and Wells Fargo continued under the contract with Mercantile performing in CLMIA's stead and did not provide notice of the breach to CLMIA within 6 months of CLMIA's December 2008 breach, Wells Fargo waived its breach of contract claim against CLMIA. The Master Swap Agreement provides specific parameters of what will constitute a default, or breach, of the agreement. Section 5 of the Master Swap Agreement governs Events of Default and Termination Events, providing in relevant part as follows:

> (a) ***Events of Default.*** The occurrence at any time with respect to a party or, if applicable, any Credit Support provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:—
>
> (i) ***Failure to Pay or Deliver.*** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party;

From the above language, it is clear that a failure to pay a due payment does not, in and of itself, trigger a default event. Rather, the failure to pay, when due, *and* if not remedied within three days after notice of the failure to pay is given to the non-paying party gives rise to an event of default. "To interpret a contract, the reviewing court must confine itself to the four corners of the document and only consider extrinsic proof if the contract is ambiguous; if the contract is not ambiguous, it must be enforced according to the plain meaning of its terms."*Mid–State Industries, Ltd. v. State,* 986 N.Y. S2d 637, 639 (2014). Thus, contrary to CLMIA's assertion, its failure to pay in December 2008 and thereafter did not automatically constitute a recognizable breach of the swap agreement (i.e., default). While the failure to pay was technically a breach of its obligation under the Master Swap Agreement, under the relevant swap agreement language, Wells Fargo was not *required* to deem the non-payment by CLMIA in December 2008 (or thereafter) as a "default" unless and until it gave CLMIA notice of the default and three days to cure. It was not asserted that the above occurred.

***18** Additionally, an event of default does not automatically terminate the Master Swap Agreement and give rise to the imposition of the early termination fee (the non-payment of which upon Wells Fargo's breach of contract action was primarily based). Section 6. of the Master Swap Agreement, entitled "Early Termination" provides:

> (a) ***Right to Terminate Following Event of Default.*** If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") *may,* but not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions .... (emphasis added).

Section 6(e)(i) of the swap agreement provides for a payment made on early termination in the event of default and the various calculation methods that may be employed to determine the amount of such payment.

The word "may" is treated as permissive, under its general and usual meaning. See, e.g., *Babcock v. Rose,* 169 Misc.2d 162, 168; 643 N.Y.S.2d 903 (1996). The non-defaulting party, in this case Wells Fargo Bank, "may" upon an event of default designate an early termination date, but it has no obligation to do so. Wells Fargo's continuation with the swap agreement, even after CLMIA discontinued making payments in December 2008 therefore provides no basis for CLMIA's claim that Wells Fargo Bank waived its breach of contract claim against it for failing to pay the termination fee. Wells Fargo was not limited under the Master Swap Agreement to wait, as it did, to declare an event of default when Mercantile discontinued paying the monthly fees and seek a termination fee from CLMIA after that time.

Moreover, while CLMIA asserts that Wells Fargo's claim should be precluded because it ignored CLMIA's December 2008 breach and continued performance of the Master Swap Agreement, CLMIA's assertion is incorrect. Wells Fargo could not have continued performance of the swap agreement because the only two participants in the agreement were Wells Fargo and CLMIA and CLMIA admittedly refused to participate in the agreement after December 2008. However, Wells Fargo and Mercantile had entered into a separate Master Swap Participation Agreement in December 2006. Under the terms of the participation agreement, Mercantile:

> irrevocably and unconditionally agrees to pay on demand by Swap Bank, without counterclaim or setoff, a percentage share, as set forth on a Participation Supplement

> (the "Percentage Share") of all Swap Liabilities (as defined below). As used herein, "Swap Liabilities" means, without duplication, with respect to each Counterparty and each Counterparty Transaction, (a) all amounts payable by such Counterparty to Swap Bank under Section 6(e) of the Counterparty Swap Agreement with respect to such Counterparty Transaction ... (c) all unpaid interest due from such Counterparty to Swap Bank in respect of such Counterparty Transaction, and (d) all other amounts owing by such Counterparty to Swap Bank in respect of such Counterparty Transaction....

***19** Under the above, Mercantile agreed to pay to Wells Fargo any amounts that CLMIA owed to Wells Fargo under the swap transaction. This included the monthly payments. Thus, Wells Fargo simply enforced its separate Master Swap Participation Agreement with Mercantile, who complied with its own agreement for a time.

In its argument, and its cases cited, CLMIA appears to confuse the principles of waiver and election of remedies. "The doctrines of waiver and election of remedies are complementary rather than competing common law contract principles. Under the doctrine of waiver, a party may, by words or conduct, waive a provision in a contract or eliminate a condition in a contract which was inserted for [its] benefit."*ESPN, Inc. v. Office of Com'r of Baseball,* 76 F Supp 2d 383, 389 (1999) (citation omitted). The swap agreement here required CLMIA to pay Wells Fargo a monthly amount based upon the floating and fixed interest rates. CLMIA refused to pay that amount, and Wells Fargo had a separate contract with Mercantile requiring it to pay any amounts CLMIA did not pay. Mercantile indicated that it would pay the monthly amounts due and Wells Fargo could, conceivably, waive the contractual provision in the swap agreement requiring CLMIA to pay the monthly amount.

And, as indicated in *ESPN, Inc. v. Office of Com'r of Baseball,* 76 F Supp 2d 383, 389 note 4 (1999), a party's waiver of a contract provision is not absolute. That is, a previously waived provision may be restored " 'by a reasonable notice demanding performance and stating that the contract will be rescinded if the notice is not complied with.' " quoting *Oleg Cassini, Inc. v. Couture Coordinates, Inc.,* 297 F Supp 821, 831 (1969). On August 13, 2010, Wells Fargo sent CLMIA a notice that it failed to make a payment as required under the transaction and that if it did not make the payment within 3 days, the failure to pay would become an event of default under the swap agreement. Thus it arguably restored any previously waived provision.

An election of remedies, on the other hand, is simply a choice among remedies by the party. "It is a decision by that party as to how it should proceed in the wake of the breaching party's nonperformance. In other words, an election is not a waiver of any rights under the contract but rather a choice between two inconsistent remedies for breach of the contract."*Id.* at 389.

Here, assuming that Wells Fargo treated CLMIA's December 2008 failure to pay as a breach or event of default, it would have to make a choice. It could send notice to CLMIA specifying the date of the event of default and designate an early termination date for the swap agreement, then calculate the termination fee. Then it would have elected termination and Wells Fargo could not continue to perform under the Master Swap Agreement or expect CLMIA's continued performance under the contract. It then could terminate the agreement and sue for damages stemming from a total breach. Alternatively, Wells Fargo could elect to continue the Master Swap Agreement despite CLMIA's December 2008 breach. In that case, it could not later decide to terminate the contract based upon the December 2008 breach, or treat the December 2008 breach as a default event. If we opt to look at this issue as an election of remedies issue, then Wells Fargo clearly chose the second option here. It did *not,* according to its pleadings or otherwise, base its breach of contract action on CLMIA's December 2008 non-payment. Wells Fargo specified that CLMIA breached the swap agreement by failing to make an August 2010 payment and failing to pay the swap agreement termination fee. The fact that the final judgment awarded Wells Fargo only the termination fee supports that Wells Fargo did not treat the December 2008 failure to pay as a breach or default. In either scenario, the trial court appropriately determined that Wells Fargo did not waive its breach of contract claim.

***20** CLMIA and Longman's final argument is two-fold. First, they argue that the trial court erred in granting summary judgment in favor of Mercantile because Mercantile had primary liability to pay the termination fee debt to Wells Fargo and, as such, could not hold a valid assignment of the debt from Wells Fargo. Second, CLMIA and Longman argue that because Wells Fargo held no personal guaranty from Longman, the trial court erred in imposing personal liability for the termination debt upon Longman.

Based on previous discussions of pertinent language in the Master Swap Agreement, an event of default did not occur until CLMIA failed to pay a monthly amount due as required and then after notice from Wells Fargo, did not cure within three business days. At that point, Wells Fargo could declare an event of default, terminate the contract, and calculate a termination fee. That is what happened here in August 2010. Once the termination fee was calculated, Wells Fargo had the right to collect that fee from CLMIA under the terms of the swap agreement. As the trial court ordered on April 5, 2012, the termination fee was $636,381.19 given its previously found early termination date of August 24, 2010, and that CLMIA was responsible for paying that termination fee to Wells Fargo. This was consistent with the language in the swap agreement.

The trial court also ordered in the April 5, 2012, order that if CLMIA failed to pay the termination fee to Wells Fargo then Mercantile would be obligated to pay the fee pursuant to the swap agreement. The swap agreement provides at section 4.

> **Receipts by Swap Bank: Remittances.**It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty Swap Agreement.*After execution of the assignment documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added)

The Participation Agreement defines "swap liabilities" as including "(a) all amounts payable by such Counterparty to Swap Bank under Section 6(e) of the Counterparty Swap Agreement with respect to such Counterparty Transaction" which is, in turn payments upon early termination of the swap agreement. Thus, the trial court's order is in conformance with the above contracts. The contracts clearly provide that CLMIA is liable for an early termination fee upon an event of default and an event of default was found to have occurred in August 2010. CLMIA does not dispute that it did not pay the early termination fee as ordered by the court. The Participation Agreement requires that Mercantile pay the termination fee if CLMIA does not and that, upon such payment, Wells Fargo must assign all of its rights and interest in the swap agreement to Mercantile upon its payment of the termination fee. Wells Fargo had the right to collect the termination fee from CLMIA. It thus assigned that right to Mercantile upon Mercantile's payment of the fee to Wells Fargo.

***21** Contrary to CLMIA's assertion, Mercantile was not primarily liable for the termination fee. That is, Mercantile did not have an independent obligation to pay the termination fee. Its obligation only arose out of CLMIA's failure to pay the same. It is true that Mercantile's obligation to pay the fee arose out of its separate Participation Agreement with Wells Fargo. But, this Participation Agreement was referenced within the swap agreement on several occasions. Where one writing references another instrument for additional contract terms, the two writings should be read together. *Forge v. Smith,* 458 Mich. 198, 207; 580 NW2d 876 (1998).

For example, at section 3(a)(v) each party represents to the other party that "[i]ts obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations .... " A "Credit Support Document" is defined in the schedule to the Master Swap Agreement as "each document which by its terms secures, guarantees or otherwise supports [CLMIA's] obligations under this Agreement ...." Likewise, Mercantile's participation in the swap agreement is specifically referenced. Section 5(a)(iii)(1) of the Master Swap Agreement defines one event of default as "[f]ailure by the party or any Credit Support provider of such party to comply with or perform any agreement or obligation to be complied with ...." A credit support provider is defined in the schedule to the swap agreement as "each party to a Credit Support Document that provides or is obligated to provide security, a guaranty or other credit support for [CLMIA's] obligations under this Agreement, including, without limitation, Mercantile Bank of Michigan." Moreover, from the above definitions, it is clear that Mercantile was acting as a surety or guarantor.

With respect to whether Longman's guaranty binds him to be liable for the judgment entered against CLMIA and in favor of Mercantile, Longman incorrectly focuses on the guaranty executed in conjunction with the swap agreement and whether this guaranty is assignable. However, on October 31, 2011, Longman executed a guaranty in favor of Mercantile. In the guaranty, Longman as guarantor "absolutely, unconditionally and irrevocably guarantees prompt payment when due ... of (a) any and all existing future indebtedness, obligations and liabilities ... to [Mercantile] ... and (c) any "Judgment", as that term is defined in Paragraph 4 below...." Judgment is thereafter defined as "any order or judgment, whether a final judgment or not, awarding the Bank, either directly or indirectly, as an assignee or otherwise, any award of money, damages, interests, costs or attorneys' fees against [CLIA, CLMIA] or [Longman] in the lawsuit filed in Kent County Circuit Court, Michigan, captioned *Mercantile Bank of Michigan v. CLMIA, LLC et al,* Case No. 09–01639–CZ (the "Lawsuit"), or in any other proceeding that may be brought regarding the subject matter of the Lawsuit."Thus, Longman agreed to guarantee the prompt payment of any judgment rendered against CLMIA in the instant case.

Mercantile's Cross–Appeal

***22** On cross-appeal, Mercantile contends the trial court erroneously accepted the factual allegation of CLMIA that an event of default under the Master Swap Agreement had occurred in granting CLMIA's motion for summary disposition concerning Mercantile's claims against it for equitable relief. We find that the trial court's ultimate conclusion did not necessarily hinge upon its erroneous conclusion that an event of default had occurred.

This Court has the discretion to grant equitable relief where a legal remedy is not available. *Tkachik v. Mandeville,* 487 Mich. 38, 45; 790 NW2d 260 (2010). As explained in *Tkachik:*

> A remedy at law, in order to preclude a suit in equity, must be complete and ample, and not doubtful and uncertain. Furthermore, to preclude a suit in equity, a remedy at law, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances. Equity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life. While legislative action that provides an adequate remedy by statute precludes equitable relief, the *absence* of such action does not. This is so because every equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate. Equity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case. *Id.* at 45–46 (internal citations and quotations omitted).

In its May 10, 2010, opinion and order, the trial court did act under the assumption (or accept CLMIA's assertion) that an event of default occurred in December 2008 when CLMIA discontinued its required payments to Wells Fargo. The trial court indicated that the Participation Agreement delineates Wells Fargo's responsibilities if an event of default occurs under the swap agreement and that Mercantile was aware of these responsibilities when presented with a "claimed event of default." The trial court opined that "[Wells Fargo] and Mercantile ... at their peril, chose to ignore the alleged default event" and that "Mercantile is contractually bound to pay only the amount of Swap Liabilities outstanding at the time of the event of default ...." under the Participation Agreement and that it further "cannot unilaterally increase its obligations and invoke equitable rights in light of unambiguous terms of the Agreements." The trial court did err in assuming or accepting that a default event did occur. Not only because this was a position advocated by the moving party, but also because as indicated previously, under the plain language of the Master Swap Agreement, the simple non-payment is not, by itself, a default event. Nevertheless, we will not reverse a lower court that reaches the right result for wrong reasons. *Taylor v. Laban,* 241 Mich.App 449, 458; 616 NW2d 229 (2000).

***23** The trial court correctly recognized that the Participation Agreement provided, at section 4:

> **Receipts by Swap Bank: Remittances.**It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty*

> *Swap Agreement.*After execution of the assignment documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added)

Because swap liabilities include any amounts owing by CLMIA to Wells Fargo, under the Swap Participation Agreement, Mercantile would be obligated to pay any monthly fee to Wells Fargo that CLMIA failed to pay. And, under the "Receipts by Swap Bank: Remittances" section of the Swap Participation Agreement upon payment of the very first monthly fee by Mercantile (i.e. swap liability), Wells Fargo was "obligated to assign to [Mercantile] all of [Wells Fargo's] rights and responsibilities under such Counterparty Swap Agreement."

While the trial court focused on the payment of the termination fee as the swap liability, it correctly noted that the payment of a swap liability by Mercantile entitled it to an assignment of rights by Wells Fargo. Mercantile thus had an adequate legal remedy, regardless of what the swap liability may have been. As such it was not entitled to equitable remedies.

Mercantile next argues that the trial court erred in interpreting the contractual provisions at issue and concluding that Mercantile's exclusive remedy was to terminate the underlying transaction. As set forth in section 4. of the Swap Participation:

> It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty Swap Agreement.*After execution of the assignment documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added).

Mercantile is correct that it could not refuse to make a monthly payment on demand from Wells Fargo. It is incorrect that it could elect to make monthly payments until it unilaterally deemed it prudent to discontinue said payments. Under the terms of the Participation Agreement, upon payment of "all other amounts owing by such Counterparty to Swap Bank in respect of such Counterparty Transaction, in each case (i) to the extent certified by Swap Bank (whether in its demand for payment or otherwise) as not having been paid by such Counterparty when due ...." Wells Fargo was to assign Mercantile all of its rights and responsibilities under the swap agreement. Mercantile cannot have it both ways. If a monthly payment falls within the definition of a swap liability, as this Court agrees that it does, then the above applies. There is nothing in the Participation Agreement to indicate that Mercantile gets to stop making payments when it chooses and thus force Wells Fargo to declare a default event when Mercantile feels it is appropriate. This would leave enforcement of the terms of the swap agreement and the potential damages for which CLMIA could be liable in the hands of a party outside of the contract signed only by CLMIA and Wells Fargo.

***24** Finally, Mercantile contends that its equitable claims against CLMIA should not have been dismissed at the pleading stage, given that it has no remedy to recover the monthly payments it made to Wells Fargo in CLMIA's stead other than through its claims of equitable subrogation, unjust enrichment, and implied contract. We disagree.

Equitable subrogation "is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other."*Auto–Owners Ins. Co. v. Amoco Prod Co.,* 468 Mich. 53, 59; 658 NW2d 460 (2003)."In order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor."*Ameriquest Mortgage Co. v. Alton,* 273 Mich.App 84, 95; 731 NW2d 99 (2006)(superseded by statute on other grounds as stated in *CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc.,* 295 Mich.App 72; 813 NW2d 332 (2011)).

Mercantile is not and would not be entitled to equitable subrogation from CLMIA because it did not make the monthly payments to Wells Fargo in order to fulfill a legal or equitable duty owed to CLMIA as the alleged subrogor. Once payment of a single swap liability was made by Mercantile under the Participation Agreement, then Wells Fargo had the obligation to assign all of its rights under the swap agreement to Mercantile. Mercantile did not ensure that it and Wells Fargo's Participation Agreement was adhered to immediately; that is a separate issue between those two parties, not raised on appeal.

Mercantile further argues that CLMIA was unjustly enriched by Mercantile's monthly payments to Wells Fargo or that it should be entitled to recover against CLMIA based on implied contract. To sustain an action for unjust enrichment, plaintiff must "establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party."*Karaus v. Bank of New York Mellon,* 300 Mich.App 9, 22–23; 831 NW2d 897 (2012).

Here, CLMIA did not receive a benefit from Mercantile.[2]First and foremost, CLMIA did not receive anything from Mercantile at all-Wells Fargo did. Second, Mercantile paid Wells Fargo a monthly fee that was purportedly due from CLMIA. However, Mercantile paid this fee for over a year. As indicated, had Mercantile paid the monthly fee one time, an event of default would have occurred and a termination fee would have been calculated. The hundreds of thousands of dollars in monthly fees that Mercantile ultimately paid and now seeks to collect from CLMIA would not have been owed to or paid to Wells Fargo by CLMIA-only a termination fee. Thus, the claim of unjust enrichment would fail in any event.

A contract will be implied only if no express contract between the same parties exists that covers the same subject matter. *Morris Pumps v. Centerline Piping, Inc.,* 273 Mich.App 187, 194; 729 NW2d 898 (2006). Furthermore, an implied contract will be found only when there has been receipt of a benefit by one party from the other, and it would be inequitable for the party to retain such a benefit. *Id.* at 195. Again, Mercantile has not and cannot establish a benefit to CLMIA from Mercantile. Thus, no implied contract theory of recovery would succeed. In sum, Mercantile's equitable subrogation, unjust enrichment, and implied contract claims were properly dismissed.

***25** Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 630259

Footnotes

1 Repealed by P.A.2008, No. 551 § 702, Eff. October 1, 2009. At the time the trial court issued its opinion, on October 9, 2009, the new Michigan Uniform Securities Act had come into effect.

2 Mercantile paid funds to Wells Fargo pursuant to its Participation Agreement with Wells Fargo. Wells Fargo thus received the benefit of those payments. Mercantile paid nothing to CLMIA and CLMIA neither asked Mercantile to pay anything on its behalf to Wells Fargo nor arguably would have owed the monthly payments to Wells Fargo. Wells Fargo would not have otherwise received the monthly payments because CLMIA made it patently clear in November 2008 that it would no longer be making the monthly payments to Wells Fargo. The Wells Fargo–CLMIA Swap Agreement contained a termination provision for such an event. Had Mercantile not made more than one such payment, as it could have done under the terms of Participation Agreement, what ultimately occurred in 2010 when Mercantile did stop making the monthly payments to Wells Fargo would have happened much earlier and the default would have occurred in December 2008. Further, CLMIA is still liable for the termination fee, as it would have been in December 2008. CLMIA thus did not receive the benefit of Mercantile's voluntary monthly payments to Wells Fargo, which Mercantile now seeks to recoup through its unjust enrichment claim.

End of Document

TAB V

2014 WL 1783146
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

YOGO FACTORY FRANCHISING, INC., Plaintiff,
v.
Edmond YING, et al., Defendants.
and
Edmond Ying, et al. Counterclaimants,
v.
Yogo Factory Franchising, Inc., et al.,
Counterclaim Defendants.

Civil Action No. 13–630 (JAP)(TJB). | Signed May 5, 2014.

Attorneys and Law Firms

Joyann Kenny, Kenny Law LLC, Matawan, NJ, for Plaintiff/Counterclaim Defendants.

Frank C. Fusco, Clifton, NJ, for Defendants/Counterclaimants.

OPINION

PISANO, District Judge.

***1** This matter comes before the Court on a motion to dismiss Defendants Edmond Ying, Nancy Canon–Ying, and OMG Froyo, LLC's (hereinafter "Defendants") Counterclaim by Plaintiff/Counterclaim Defendants Yogo Factory Franchising, Inc. ("YFF"), Yogurt Werks, Inc. ("YWI"), Brian Petruzzi, and Ryan Mastro (together, the "YFF Parties") pursuant to Fed.R.Civ.P. 12(b)(6) and/or Fed.R.Civ.P. 9(b). In its Complaint, YFF, a franchisor, has brought claims for trademark infringement, unfair competition, misappropriation of trade secrets, breach of a certain franchise agreement, and tortious interference against Defendants, a franchisee, his wife, and a company formed and owned by his wife. Defendants now counterclaim that the YFF Parties fraudulently induced Ying into entering into three franchise agreements. The Court decides this matter without oral argument pursuant to Fed.R.Civ.P. 78(b). For the reasons set forth below, the YFF Parties' Motion to Dismiss Defendants' Counterclaim is granted.

I. *Background*

A. The Parties

Yogurt Werks, Inc. ("YWI") is a corporate entity organized pursuant to the laws of the State of New Jersey in June 2011 and maintains its principal place of business within New Jersey. Yogo Factory Franchising, Inc. ("YFF") is a New Jersey corporation with its principal place of business in Galloway, New Jersey. It was organized in February of 2012. YFF is a franchisor of the Yogo Factory franchise system (the "System"), offering the right to open and operate frozen yogurt stores operating under the licensed mark Yogo Factory. YWI is an affiliate of YFF. Brian Petruzzi is alleged to be the CEO and president[1] of YFF, a position he has held since YFF's inception in February 2012. He is also alleged to be the president and CEO of YWI. Ryan Mastro is YFF's Franchise Coordinator, and has served in that position since YFF's inception in February 2012.

Edmond Ying is a New Jersey citizen and resident who entered into three Franchise Agreements with Plaintiff and/or YWI to open and operate three Yogo Factory stores. OMG Froyo, LLC is a New Jersey limited liability company formed by Nancy Canon–Ying, Ying's wife, in November 2012.

B. Factual Background[2]

1. *The Howell Store*

In August 2011, Ying contacted YWI and expressed an interest in purchasing a Yogo Factory franchise. On or about August 30, 2011, Petruzzi emailed Ying a document entitled "Yogurt Werks, Inc. d/b/a/ Yogo Factory Frozen Yogurt Franchise Information and Disclosure Package" (hereinafter the "Howell FDD"). The Howell FDD cautions prospective franchisees to "to rely *only* on information contained in this memorandum in reaching a franchise licensing investment decision" and that "[t]he franchise license is speculative and involves a high degree of risk. A license should be purchased only by those who can afford to risk their loss of their entire investment."*See* Countercl. Ex. B at 4. It states that there are currently two company owned stores, and that no franchised stores currently exist. Defendants allege that this FDD did not follow the "prescribed methods of providing required information to Ying;" for example, they specify that the Howell FDD did not include separately indicated sections.

*2 Along with the Howell FDD, Defendants allege that Petruzzi also made various representations to Ying before he purchased the Howell Store. These representations include information regarding the yearly sales of a Yogo Factory franchise; that a franchisee could rely on provided sales and financial information, and did not need retail or business experience to succeed; that YFI would provide advertising and appropriate, effective pre-opening services; that the Yogo Factory brand was being aggressively promoted and was expanding; that YWI would continue to develop the reputation and good will associated with the Yogo Factory name; and that YWI would provide "complete support" to franchisees after opening their franchise stores. These representations do not exist within the Howell FDD.

Defendants allege that Ying paid YWI $25,000 as an initial franchise fee on or about September 25, 2011 to develop a franchise in Howell, New Jersey (the "Howell Store"). On or about October 14, 2011, Ying entered into a franchise agreement (the "Howell Franchise Agreement") with YWI. Relevant for purposes of this motion, Section 9 of the Howell Franchise Agreement states: "This Agreement is made in New Jersey. Any disputes arising from this Agreement (except the restrain provisions of Paragraph 6) shall be subject to arbitration in New Jersey under the Rules and auspices of the American Arbitration Association or other mutually agreeable arbitrator."*See* Pl.'s Br. Ex. A at 24.[3]

2. *The Galloway Store*

During April 2012, Petruzzi and Ying entered into an agreement for Ying to purchase Petruzzi's personally-owned Yogo Factory store in Galloway, New Jersey (the "Galloway Store"). Defendants allege that Petruzzi made the same exact eight representations[4] to Ying about the Galloway Store before he purchased it, which accordingly do not exist within the FDD.

On or about April 2, 2012, Mastro emailed Ying a franchise disclosure document (the "Galloway FDD") for his review. The Galloway FDD "summarizes certain provisions of [the] franchise agreement and other information in plain English."*See* Countercl. Ex. C at 1. While the Galloway FDD is lengthy, only a few provisions are relevant for this motion. First, in Item 3 of the Galloway FD, the potential franchisee is informed that Petruzzi was involved in two prior litigations. *See id.* at 4. Next, Item 7 of the Galloway FDD estimates the initial investment funds necessary to open a Yogo Factory store, but cautions that the numbers listed are estimates only and there is no guarantee that a franchisee's costs will fall within the states ranges. The Galloway FDD advises the potential franchisee that he or she is responsible for obtaining certain insurance policies, including workers' compensation insurance. *Id.* at 11.The Galloway FDD reminds the potential franchisee that estimates are for initial start-up costs only, and do not include ongoing costs for things such as marketing and advertising expenses. *Id.* at 12.In Item 11, the Galloway FDD states that the franchisor will provide a training program to the franchisee and its manager, and that it may provide other training programs after the opening of the franchisee store, if deemed advisable. *Id.* at 20, 22–23.It also states that an operations manual will be provided. *Id.* at 24.

*3 In Item 19 of the Galloway FDD, certain financial performance representations are made, pursuant to the Federal Trade Commission's ("FTC") Franchise Rule. The Section explains that "financial performance information that differs from that included in Item 19 may be given only if ... a franchisor provides the actual records of an existing outlet you are considering buying."*Id.* at 38.It explains that the historical performance representation is based upon the two affiliate-owned stores in New Jersey, which have limited operating history, having first opened in 2011. It also states that there are no currently franchised locations as of February 2012. The Section later emphasizes this point:

> CAUTION: ONLY THE TWO COMPANY STORES LISTED IN THIS ITEM ACHIEVED THE REPORTED RESULTS. YOUR INDIVIDUAL RESULTS MAY DIFFER. THERE IS NO ASSURANCE YOU WILL SELL AS MUCH OR THAT YOUR COSTS AND EXPENSES WILL NOT EXCEED THOSE PROVIDED IN THIS ITEM.
>
> YOU ARE STRONGLY ADVISED TO CONDUCT AN INDEPENDENT INVESTIGATION OF THE COSTS AND EXPENSES YOU WILL INCUR IN OPERATING YOUR FRANCHISED BUSINESS.

Id. at 41.The Section twice cautions that "we do not make any representations about any Store's past, current or future financial performance.... We do not authorize our employees or representatives to make any such representations either orally or in writing."*Id.* at 38, 41.The only exception made is "[i]f you are purchasing an existing Store ... we may provide you with the actual records of that store."*Id.* The Section also takes care to list out different ways in which sales or costs may be affected.*Id.* at 40–41.It stresses that the franchisor "cannot and do[es] not guarantee that you will not have different or additional expenses starting your business."*Id.* at 10, 12.It suggests, numerous times, for a potential franchisee to review the figures with a business advisor before making a decision to purchase the franchise. *Id.* at 1, 10, 12, 38, 41.

Along with the Galloway FDD, Defendants allege that Mastro emailed to Ying the Galloway Store's cash flow and expense statements on April 23, 2012 to "further persuade Ying" to purchase the store. Countercl. ¶ 27. These statements suggested that the Galloway Store's financial performance was "outstanding." *Id.* at ¶ 26, 28.Defendants allege that Petruzzi and Mastro both represented to Ying that the Galloway Store was " 'turn key' in that its staff could operate the location on their own with little to no supervision" and that Ying could therefore be an "absentee franchisee-owner." *Id.* at ¶ 25.

Defendants allege that Ying entered into a "Business Sale Agreement" with Petruzzi to purchase the Galloway Store for $650,000 on April 25, 2012. Ying thereafter delivered $325,000 to YFF on April 29, 2012. After approximately a month of operating the Galloway Store, Ying became frustrated with the performance of the store. On June 1, 2012, Ying entered into an agreement with Petruzzi to sell the Galloway Store back to Petruzzi for $325,000, payable in $27,083 monthly installments.

3. *The Manahawkin Store*

***4** On June 2, 2012, Ying entered into another Franchise Agreement with YFF, in which he was granted the right to open and operate a third Yogo Factory store in Manahawkin, New Jersey (the "Manahawkin Store"). Ying was allegedly not given a FDD prior to his purchase of the Manahawkin Store. Defendants allege that, at some point before he purchased the Manahawkin Store, Petruzzi and Mastro made the same eight representations to Ying "to induce him into purchasing another franchise."Countercl. at ¶ 34.

The Manahawkin Franchise Agreement contain a provision that the written contract constitutes the entire agreement between the parties and that "no other representations hav[e] induced you to execute this Agreement," but that "nothing in this Agreement is intended to disclaim the representations YFF made in the franchise disclosure document YFF furnished to you."Another provision states that the franchisee has conducted an independent investigation of the franchise business, and realizes the business venture involves risk. It continues:

> Your success in this business is not guaranteed, is speculative and depends, to an important extent, upon your ability as an independent business person. YFF does not represent or warranty that the Store will achieve a certain level of sales or be profitable.... YFF expressly disclaims the making of, and you acknowledge you have not received, any warranty or guarantee, express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

See Compl. Ex. B at 46–47. The franchise agreements contain a "franchise disclosure questionnaire" that Ying signed on June 5, 2012. The questionnaire asks the following questions:

> Has any employee or other person speaking on behalf of YFF made any statement or promise concerning the revenue, profits or operating costs of YFF [*sic*] store or business operated by YFF or its franchisees except as expressly provided in Item 19 of the Franchise Disclosure Document?
>
> Has any employee or other person speaking on behalf of YFF made any statement or promise concerning a Yogo Factory store, kiosk or cart that is contrary to, or different from, the information contained in the Disclosure Document?
>
> Has any employee or other person speaking on behalf of YFF made any statement or promise regarding the amount of money you may earn in operating a Yogo Factory store or business?
>
> Has any employee or other person speaking on behalf of YFF made any statement, promise or agreement concerning the advertising, marketing, training, support service or assistance that YFF will furnish to you that is contrary to, or different from, the information contained in the Disclosure Document?

Ying answered "No" to each of these questions. The questionnaire also asked if the franchisee "understand[s] that the approval of YFF of the Approved Store Location for a Yogo Factory store does not constitute an assurance, representation, or warranty of any kind as to the successful operation or profitability of a Yogo Factory store at the Approved Store Location?"Ying answered "Yes" to this question. *See* Compl. Ex. B at Ex. 8. The Manahawkin Store opened on August 11, 2012.

C. Defendants' Counterclaim

***5** In their Counterclaim, Defendants have brought claims for fraud, negligent misrepresentations, civil RICO, a violation of the New Jersey Consumer Fraud Act ("NJCFA"), breach of contract, and malicious use and abuse of process against the YFF Parties. The basis of this Counterclaim appears to be that Ying was induced into purchasing three Yogo Factory franchises, which have allegedly not earned what they were represented to earn. Defendants further allege that certain costs, such as building-out the stores and food inventory, were higher than indicated. Defendants also claim that Ying was misled about the profits it would make because Ying was not told that the stores would be required to accept certain coupons from customers that reduced their profit margin. Defendants further claim that YFF did not provide effective advertising and did not provide adequate assistance in Ying's build-out of the Howell and Manahawkin Store. They also claim that the YFF Parties did not disclose certain insurance expenses, and that Ying was never provided with an operations manual or with training.

II. *Standard of Review*

When deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must first separate the factual and legal elements of the claims, and accept all of the wellpleaded facts as true. *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210–11 (3d Cir.2009). All reasonable inferences must be made in the non-movant's favor. *See In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 314 (3d Cir.2010). The Court then determines whether the pleading at issue "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Specifically, when assessing the sufficiency of a civil complaint, a court must distinguish factual contentions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."*Iqbal,* 556 U.S. at 678. Any legal conclusions are "not entitled to the assumption of truth" by a reviewing court. *Id.* at 679.Rather, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."*Id.*

In addition, Rule 9(b) requires that "in all averments or fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."Fed.R.Civ.P. 9(b).Rule 9(b)'s heightened pleading standard for fraud claims is meant "to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior."*Seville Indus. Mach. v. Southmost Mach.,* 742 F.2d 786, 791 (3d Cir.1984). In general, the complaint must describe the "who, what, when, where and how of the events at issue."*In re Rockefeller Ctr. Props. Secs. Litig.,* 311 F.3d 198, 217 (3d Cir.2002) (citations and quotations omitted).

***6** Generally, our task in assessing a motion to dismiss requires it to disregard any material beyond the pleadings. *See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997). The court, however, may consider "a document integral to or explicitly relied upon in the complaint," whether or not the document is attached to the challenged pleading. *Id.* (internal quotation marks and citation omitted). Furthermore, a court need not accept allegations as true that are contradicted by the documents upon which a party's claims are based. *See Warburton v. Foxtons, Inc.,* Civil Action No. 04–2474, 2005 U.S. Dist. LEXIS 39615, at *10, 2005 WL 1398512 (D.N.J. June 13, 2005) (citing *Genesis Bio–Pharmaceuticals, Inc. v. Chiron Corp.,* 27 F. App'x. 94, 99–100 (3d Cir. Jan.10, 2002)).

IV. *Discussion*

A. The Howell Store Franchise Agreement Arbitration Clause

As discussed, under Section 9 of the Howell Franchise Agreement, YWI and Ying agreed that "[a]ny disputes arising from this Agreement (except the restraint provisions of Paragraph 6) shall be subject to arbitration in New Jersey under the Rules and auspices of the American Arbitration Association or other mutually agreeable arbitrator."Pl.'s Br. Ex. A at 24. The YFF Parties argue that, pursuant to this arbitration provision, all the claims relating to the Howell Franchise Agreement must be dismissed, and arbitration should be compelled. In their Opposition, Defendants agree that all contractual claims stemming from the Howell Franchise Agreement should be arbitrated, but that any tort or statutory claims relative to the Howell Agreement should be determined by this Court.

In considering the propriety of arbitration, a court must make "a two-step inquiry into (1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement."*Trippe Mfg. Co. v. Niles Audio Corp.,* 401 F.3d 529, 532 (3d Cir.2005). There is a presumption in favor of arbitrability when determining both the existence and scope of an arbitration agreement. *See id.*Here, Defendants concede that there is a valid agreement to arbitrate. Therefore, the Court must determine whether Defendants' tort and statutory claims fall within the scope of the arbitration provision.

Here, the language of the arbitration clause states that disputes "arising from" the Howell Franchise Agreement must be arbitrated. Defendants argue that the provision should be interpreted narrowly because is excludes from arbitration the "restraint provisions of Paragraph 6," which relate to certain proprietary information and property and intellectual property of the franchisor. The Court disagrees. The Third Circuit gives "an expansive interpretation to 'arising from.' " *Medtronic AVE Inc. v. Cordis Corp.,* 100 F. App'x 865, 868 (3d Cir.2004) (quoting *Battaglia v. McKendry,* 233 F.3d 720, 727 (3d Cir.2000) ("[W]hen phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction."). While Defendants argue that the provision is restrictive because it excludes a certain category of disputes, the Third Circuit has found that such exclusionary language confirms a broader reading of an arbitration provision precisely because "something can be excluded only if it would be otherwise included." *Medtronic AVE Inc.,* 100 F. App'x at 868. It follows, therefore, that the disputes must otherwise be "a subset of the larger set of disputes" arising from the Franchise Agreement. *Id.*

*7 Therefore, the Court finds that Defendants' tort and statutory claims fall within the scope of the Franchise Agreement. It is well-established that "[i]f the allegations underlying the claims touch matters covered by [an arbitration provision], then those claims must be arbitrated, whatever the legal labels attached to them."*Brayman Constr. Corp v. Home Ins. Co.,* 319 F.3d 622, 626 (3d Cir.2003). Here, Defendants' counterclaims pertaining to the Howell Store revolve around the Howell Franchise Agreement; for example, Defendants claim that Petruzzi fraudulently induced Ying to enter into the Howell Agreement based upon certain representations made to him. Such claims clearly "arise from" the Howell Agreement. *See Launch Fitness, LLC v. GoPerformance Franchising, LLC,* 2013 U.S. Dist. LEXIS 41913, at *8–9, 2013 WL 1288253 (D.N.J. Mar. 26, 2013) (finding that that plaintiffs were fraudulently induced to enter into a franchise agreement fell under an arbitration clause as a claim "arising from" the agreement). Overall, "[a]n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."*Medtronic AVE Inc. v. Advanced Cardiovascular Sys.,* 247 F.3d 44, 55 (3d Cir.2001) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Here, it could not be plausibly said-nevertheless said with "positive assurance"-that the "arising from" language of the provision does not require arbitration of the tort and statutory claims. Therefore, all claims relating to the Howell Franchise Agreement are dismissed, and the parties are ordered to submit these claims to arbitration in accordance with the terms of their agreement.

B. Defendants' Fraud Claim

Count One of Defendants' Counterclaim is for fraud. In order to establish a claim for fraud, Defendants must establish: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person and (5) resulting damages."*Gennari v. Weichert Co. Realtors,* 148 N.J. 582, 610, 691 A.2d 350 (1997). Even when reviewing the Counterclaim in the light most favorable to the Defendants, the claim must be dismissed.

First, a fraud claim must be pleaded with particularity. This heightened pleading standard can be met by "alleging the identity of the person who made the alleged representation, the general content of the representation, along with the date, place, and time the representation was made."*Bintliff–Ritchie v. Am. Reinsurance Co.,* 2007 U.S. Dist. LEXIS 10469, at *15–16, 2007 WL 556895 (D.N.J. Feb. 15, 2007) (citing *Lum v. Bank of America,* 361 F.3d 217, 224 (3d Cir.2004)). Here, Defendants' general allegations of fraud do not comply with Rule 9(b). Defendants have alleged one broad claim of fraud as to all the YFF Parties in connection with all the transactions that are at issue in this case. This is insufficient. For example, Defendants have asserted that the YFF Parties "made misrepresentations knowing their statements were false."Countercl. ¶ 56. Defendants, however, fail to specify which member of the YFF Party made what alleged misrepresentation and when. Defendants have referenced that these material misrepresentations relate to the "financial performance of franchises," but have not specified anywhere exactly what was materially misrepresented. Further, while Defendants have pointed to the list of representations that Petruzzi and/or Mastro made to Ying before he purchased each stores as examples of misrepresentations, these allegations give no indication of when these statements took place, or how these misrepresentations were conveyed to Ying. Additionally, Defendants claim that Ying "reasonably relied on the misrepresentations in purchasing the Yogo Factory franchises," but fail to allege what misrepresentations Ying has relied on for which store. In sum, Defendants' fraud claim is almost entirely made of legal conclusions, leaving the YFF Parties to guess at the "who, what, when, where and how of the events at issue."*In re Rockefeller Ctr. Props. Secs. Litig.*, 311 F.3d at 217.

***8** However, even if Defendants' fraud claim was pled with particularity, it would still fail to state a claim. The crux of the Defendants' claim appears to be that the YFF Parties misrepresented the amount of money Ying's franchises would generate and the amount of support the franchisors would provide. *See* Opp. Br. at 15–16. The YFF Parties argue that Defendants cannot establish reasonable reliance on a material misrepresentation, in light of the express provisions of the franchise agreements and the language of the FDD.

As Defendants concede, only the Howell Franchise Agreement does not contain an integration clause. *See* Opp. Br. at 14–15. The other franchise agreements entered into between the parties contained integration clauses. *See* Compl. Ex. B at 45. Specifically, the agreement states that it constitutes "the entire, full and complete Agreement" between the parties, and that it "supersedes all prior agreements." It goes on to state that "no other representations hav[e] induced you to execute this Agreement."The agreement also makes clear that the investment in a franchise includes a large amount of risk and that any success is speculative, and therefore requires an independent investigation of the franchise business. Defendant Ying also completed and signed the franchise disclosure questionnaire, the purpose of which was "to determine whether any statements or promises were made to you that [YFF] has not authorized and that may be untrue, inaccurate, or misleading."*See* Compl. Ex. B at Ex. 8. By signing this document, Ying represented that no person speaking on behalf of YFF made any promise concerning the revenue, profits, or operating costs of a YFF store, except as expressly provided in Item 19 of the FDD. *See id.*He also represented that no employee or person speaking on behalf of YFF made any sort of promise concerning the likelihood of success or profitability he may achieve operating a Yogo Factory store, and that no person made any statement concerning the advertising or training that YFF will furnish to him that is different from what was contained in the FDD. *Id.*

Therefore, the Court finds that Ying's reliance on the YFF Parties alleged prior representations is not reasonable based upon the integration clause in the franchise agreements and the franchise questionnaire. Courts in this District have held that integration clauses or disclaimers in franchise agreements make "alleged reliance on any prior representations not contained in the Franchise Agreements ... unreasonable as a matter of law."*Jackson Hewitt Inc.* v. Childress, No. 06–0909, 2008 U.S. Dist. LEXIS 24460, at *32 (D.N.J. Mar. 21, 2008); *see also Wingate Inns Int'l, Inc. v. Swindall,* No. 12–248, 2012 U.S. Dist. LEXIS 152608, at *5–7, 2012 WL 5252247 (D.N.J. Oct. 23, 2012); *Ramada Franchise Sys. v. Eagle Hospitality Grp.,* No. 03–3585, 2005 U.S. Dist. LEXIS 45102, at *27 (D.N.J. June 24, 2005). Likewise, here, Ying cannot reasonably allege that he relied on any prior oral representations that may have been made to him, as the franchise agreement he signed contained an integration clause that specifies that it is the entire agreement between the parties, that no other representations induced him into signing the agreement, and that the agreement superseded all earlier agreements. Furthermore, he represented and acknowledged that no other promises or warranties had been made to him regarding the possible success or profitability of his stores, and that he understood the great amount of risk and speculation involved with undertaking this business venture.

***9** Defendants argue that Ying could rely on the information appearing in the FDD he received because the integration clause states that "nothing in this Agreement is intended to disclaim the representations YFF made in the franchise disclosure document...."*See* Compl. Ex. B at 45. Defendants contend that the financial performance representations were materially misleading. This argument also fails. Item 19 (and indeed, the entire FDD) makes clear of the risk and speculation involved with opening a store, warning that there are only two company stores that have been open for less than a year and that an individual franchisee's results may differ. It expressly states that "[t]here is no assurance you will sell as much or that your costs and expenses will not exceed those provided in this item" and that "[t]here is no assurance that you'll earn as much," and "strongly advise[s]" a potential franchisee to conduct an individual investigation. *See* Countercl. Ex. B at 38, 41. It details many ways in which a potential franchisee's sales and costs could be affected. *See id.* at 39–41.Item 19 also cautions that the YFF "do[es] not make any representations about franchisee's future financial performance."*Id.* at 41.Furthermore, to the extent that Defendants have alleged that the costs of building out the Manahawkin Store were understated in Item 7 or that the costs of food were understated in the agreement, the FDD makes clear that these numbers are estimates. Such predictions of future events are not actionable under a fraud claim, because they are not a statement of present or past fact.[5] *See Baer v. Chase,* Civil Action No. 02–2334, 2004 U.S. Dist. LEXIS 3954, at *30–31, 2004 WL 350050 (D.N.J. Feb. 20, 2004); *Alexander v. CIGNA Corp.,* 991 F.Supp. 427, 435 (D.N.J.1997) ("Statements as to future or contingent events, to expectations or probabilities, or as to what will or will not be done in the future, do not constitute misrepresentations, even though they may turn out to be wrong."). Therefore, Defendants cannot plausibly argue that Ying reasonably relied upon these estimates of earning potential or of start-up costs.

Defendants appear to also allege that part of their fraud claim is based upon the alleged failure of the YFF Parties to comply with applicable FTC franchise disclosure rules. *See*16 C.F.R. § 436.1 *et seq.*[hereinafter, the "FTC Rule"]. This effort to incorporate the specific prohibitions and requirements of the FTC Rule into a fraud claim "is in effect an attempt by a private party to enforce the terms of [the FTC Rule] against another private party ."*Vino 100, LLC v. Smoke on the Water, LLC,* 864 F.Supp.2d 269, 281 (E.D.Pa.2012). However, "[t]t is well settled that there is no a private cause of action for violation of the FTC franchise disclosure rules."[6] *Robinson v. Wingate Inns Int'l, Inc.,* No.: 13–2468, 2013 U.S. Dist. LEXIS 179997, at *5–6, 2013 WL 6860723 (D.N.J. Dec. 20, 2013) (citing *Sandoz Pharm. Corp. v. Richardson–Vicks, Inc.,* 902 F.2d 222, 231 (3d Cir.1990) (noting that the FTC statute does not create "an express or implied private right of action")); *see also Holloway v. Bristol–Myers Corp.,* 485 F.2d 986, 987 (D.C.Cir.1973) ("[P]rivate actions to vindicate rights asserted under the Federal Trade Commission Act may not be maintained."); *Vino 100,* 864 F.Supp.2d at 281. Therefore, Defendants cannot base their fraud claims on such an alleged violation.

***10** The few remaining allegations that Defendants point to as examples of material misrepresentations are also insufficient. If anything, these allegations form the basis of a claim for breach of contract. Here, for example, Defendants have alleged that the YFF Parties did not provide an operations manual or training in the manner set forth in the FDD, that the YFF Parties failed to provide "adequate specifications and design assistance" with the build-out of two of Ying's stores, and that the YFF Parties failed to provide adequate advertising. Such obligations of YFF are set forth in the franchise agreements. Any failure to comply with these obligations does not constitute fraud.[7] Claims for fraud in the performance of a contract are not cognizable under New Jersey law. *See Gleason v. Norwest Mortg., Inc.,* 243 F.3d 130, 144 (3d Cir.2001)."Broken promises that relate to the performance of a contract are breaches of contract, not fraud claims."*Atl. City Assocs. LLC v. Carter & Burgess Consultants, Inc.,* No. 05–3227, 2007 U.S. Dist. LEXIS 72649, at *17–18, 2007 WL 2892680 (D.N.J. Sept. 28, 2007) (citing *Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.,* 226 F.Supp.2d 557, 564 (D.N.J.2002)). Finally, Defendants have also alleged what appear to be allegations of certain fraudulent omissions by the YFF Parties. First, Defendants have alleged that the requirement to accept certain coupons from customers was not disclosed to Ying. As the YFF Parties point out, either YFF had the contractual right to require Ying to honor coupons or it did not. Either way, this allegation forms the basis of a possible contract claim, if anything. Next, Defendants allege that the requirement to purchase workers' compensation insurance was never disclosed to Ying. This allegation is refuted by the express terms of both the franchise agreements and the FDD.

Therefore, Defendants have failed to allege a plausible claim for fraud. Not only does their claim for fraud fail to reach the heightened pleading requirements under Rule 9(b), but Defendants have also failed to allege reasonable reliance on any misrepresentations by the YFF Parties. Because Defendants have failed to sufficiently allege fraud, Count One is dismissed.

C. Defendants' Negligent Misrepresentation Claim and Civil RICO Claim

Count Two of Defendants' Counterclaim alleges negligent misrepresentation by the YFF Parties. A claim for the tort of negligent misrepresentation requires "an incorrect statement, negligently made and justifiably relied upon" and damages sustained as a result of that reliance. *H. Rosenblum, Inc. v. Adler,* 93 N.J. 324, 334, 461 A.2d 138 (1983). Because "[t]he element of reliance is the same for fraud and negligent misrepresentation,"*Kaufman v. I–Stat Corp.,* 165 N.J. 94, 109, 754 A.2d 1188 (2000), Defendants' counterclaim for negligent misrepresentation must also be dismissed. Similarly, Defendants' failure to plausibly allege fraud dooms Defendants' claim for civil RICO, which is predicated on mail and wire fraud. *See Lum v. Bank of Am.,* 361 F.3d 217, 223–24 (3d Cir.2004). Therefore, Counts Two and Four of Defendants' Counterclaim must be dismissed.

D. Defendants' NJCFA Claim

***11** Defendants have alleged a violation of the New Jersey Consumer Fraud Act (the "NJCFA") in Count

Three of their Counterclaim. The NJCFA "provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace."*Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 576 (2011) (citing *Lee v. Carter–Reed Co.*, 203 N.J. 496, 521 (2010)). Accordingly, the NJCFA is intended to protect consumers who purchase "goods or services generally sold to the public at large."*Marascio v. Campanella*, 298 N.J.Super. 491, 499, 689 A.2d 852 (App.Div.1997)."The entire thrust of the Act is 'pointed to products and services sold to consumers in the popular sense.'"*Arc Networks, Inc. v. Gold Phone Card Co., Inc.*, 333 N.J.Super. 587, 756 A.2d 636, 638 (Law Div.2000) (quoting *Neveroski v. Blair*, 141 N.J.Super. 365, 378, 358 A.2d 473 (App.Div.1976)). The YFF Parties argue that this claim should be dismissed because a franchise such as Yogo Factory is not consumer merchandise that is typically offered for sale to the public at large. The Court agrees.

The Third Circuit has specifically held that the NJCFA does not apply to the sale of franchises, explaining that

> even where franchises or distributorships are available to the public at large in the same sense as are trucks, boats or computer peripherals, they are not covered by the [NJCFA] because they are businesses, not consumer goods or services. They never are purchased for consumption. Instead, they are purchased for the present value of the cash flows they are expected to produce in the future and ... bear no resemblance to the commodities and services listed in the statutory definition of "merchandise" or the rules promulgated by the Division of Consumer Affairs.

J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1274 (3d Cir.1994). Defendants argue that the sale of the Yogo Factory franchise does fall into the gambit of the NJCFA because the franchise was sold to the general public. *See* Opp. Br. at 9–10. The Court disagrees. First, Defendants' argument is based upon their claim that YFF "used general advertising over the internet to solicit and sell franchises."Opp. Br. at 10. This allegation, however, is notably missing from the Counterclaim and was raised for the first time in their Opposition Brief. Therefore, it cannot appropriately form the basis of any of their claims nor be considered by a court in determining the sufficiency of a party's counterclaims under Rule 12(b)(6).*See, e.g., Frederico v. Home Depot*, 507 F.3d 188, 201–02 (3d Cir.2007); *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir.1988) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

Even if the Court were to consider this allegation, the claim still fails as a matter of law. The Court is mindful of *Kavky v. Herbalife Int'l of Am.*, 359 N.J.Super. 497, 498–99, 820 A.2d 677 (App.Div.2003), which rejected the rule in *J & R Ice Cream.*This Court, however, is obligated to follow the Third Circuit's prediction of New Jersey law, notwithstanding New Jersey Appellate court decisions to the contrary, in the absence of a definitive statement by the New Jersey Supreme Court. *See Debiec v. Cabot Corp.*, 352 F.3d 117, 131 (3d Cir.2003). Furthermore, *Kavky* is factually distinguishable from this case. In *Kavky*, the franchisor at issue offered to "make anyone a distributor in return for $85 and to provide "Pre–Paid Retail Internet Customers' at $8.50 per customer."*Kavky*, 359 N.J.Super. at 498, 820 A.2d 677. There, where the franchisor was contracting with "anyone" to provide costumer inventory for a set amount per costumer, the franchisee was more akin to a traditional consumer than here, where a franchisee is "purchasing the use of a mark more generally."[8]*Wingate Inns Int'l, Inc. v. P.G.S., LLC*, No. 09–6198, 2012 U.S. Dist. LEXIS 115745, at *25–26, 2012 WL 3550769 (D.N.J. Aug. 16, 2012); *see also Swindall*, 2012 U.S. Dist. LEXIS 152608, at * 12, 2012 WL 5252247.The *Kavky* Court also noted that it did not disagree with the result in *J & R Ice Cream* because "it appears to have involved a substantial and complex commercial transaction."*Kavky*, 359 N.J.Super. at 501, 820 A.2d 677. The complexity of the transaction between the parties here puts this case squarely in the realm of *J & R Ice Cream.*Therefore, regardless of whether there is a blanket rule that prevents the application of the NJCFA to franchises, it does not apply in this case. Therefore, Count Three of Defendants' counterclaim must be dismissed.

E. Defendants' Breach of Contract Claim

***12** In Count Five of their Counterclaim, Defendants bring a breach of contract claim. To state a claim for breach of contract under New Jersey law, a plaintiff must allege: (1) the existence of a valid contract between itself and the defendant; (2) that the defendant materially breached the contract; and (3) the plaintiff suffered damages as a result of the breach. *FletcherHarlee Corp. v. Pote Concrete Contractors, Inc.*, 421 F.Supp.2d 831, 833 (D.N.J.2006) (citing *Coyle v. Englander's*, 199 N.J.Super. 212, 488 A.2d 1083 (N.J.Super.Ct.App.Div.1985)). Here, Defendants claim that the YFF Parties have "failed to perform their contractual obligations."Countercl. ¶ 93. However, while Defendants have named the entirety of the YFF Party as having breached their contractual obligations, the Counterclaim lacks any allegations of a contract that existed between Mastro and any of the Defendants, and YWI is not a party to either the Galloway or Manahawkin Franchise Agreements. Likewise, Defendants have not properly alleged a contractual obligation that YFF itself has breached in either the Galloway or Manahawkin Franchise Agreements. While such claims may exist, Defendants' Counterclaim has couched those allegations in tort theories, leaving the Court to speculate as to what provisions of either Agreement were breached.

Defendants, however, have alleged that Petruzzi is contractually obligated to pay "Ying the remaining $140,000 he owes Ying for the Galloway Store."Countercl. ¶ 92. This allegation appears to be in reference to the allegation that Petruzzi and Ying entered into an agreement where Petruzzi would buy back the Galloway Store from Ying for a set amount of money. *See* Countercl. ¶ 33. Defendants, however, have failed to appropriately allege any facts that a breach of contract occurred; rather, all that is alleged is that there was a contract and that Ying is owed certain damages. Defendants' allegation that "Counterclaim Defendants have failed to perform their contractual obligations" is merely a legal conclusion, and is thus not entitled to the assumption of truth. Overall, Count Five must be dismissed.

F. Canon–Ying's Claims for Malicious Use and Abuse of Process

In Count Six, Defendant Canon–Ying asserts counterclaims for malicious use of process and abuse of process against YFF. Canon–Ying's claims stem from the filing of a claim against her for tortious interference in the Complaint. To state a claim for malicious use of process under New Jersey law, Canon–Ying must allege (1) a proceeding instituted against the plaintiff without probable cause (2) with malice, (3) the proceeding was terminated favorably to the plaintiff, and (4) a "special grievance" as suffered. *See Turner v. Wong,* 363 N.J.Super. 186, 203–04, 832 A.2d 340 (App.Div.2003)."The absence of any one of these elements is fatal ."*Brien v. Lomazow,* 227 N.J.Super. 288, 300, 547 A.2d 318 (App.Div.1988) (internal citation omitted). This claim must be dismissed, therefore, because the claims against Canon–Ying have not yet been determined or otherwise terminated in her favor.

***13** On the other hand, "[t]he tort of malicious abuse of process lies not for commencing an improper action, but for misusing or misapplying process after it is issued."*Hoffman v. Asseenontv.Com, Inc.,* 404 N.J.Super. 415, 431–32, 962 A.2d 532 (App.Div.2009). Therefore, courts must focus on "not what prompted the suit but what action plaintiff engaged in after the commencement of the action."*Id.* In order to state a claim for malicious abuse of process, a party must allege "that the defendant perform[ed] 'further acts' after issuance of process which represent the perversion or abuse of the legitimate purposes of that process. *Baglini v. Lauletta,* 338 N.J.Super. 282, 294, 768 A.2d 825 (App.Div.2001) (internal quotation omitted). Examples of appropriate "further acts" that could establish an abuse of process tort include "attachment, execution, garnishment, sequestration proceedings, arrest of the person and criminal prosecution and even such infrequent cases as the use of a subpoena for the collection of a debt."*Id.* (citation omitted). Here, Defendant's claim is not for the misuse of any subsequently issued process, but rather for the filing of a claim against her at all. *See* Countercl. ¶ 97. Even if YFF's claim against Canon–Ying is inspired by a malicious or improper motive, as alleged, "that in itself is not sufficient to sustain a complaint for malicious abuse of process."*Penwag Property Co. v. Landau,* 148 N.J.Super. 493, 498, 372 A.2d 1162 (App.Div.1977). Therefore, Defendant Canon–Ying's claim for malicious abuse of process cannot stand. Accordingly, Count Six is dismissed.

V. *Conclusion*

The YFF Parties' motion to dismiss Defendants' Counterclaim is granted.[9] The claims, however, will be dismissed without prejudice. To the extent the deficiencies can be cured by way of amendment, Defendants are granted thirty days to file an Amended Counterclaim solely for the purposes of amending such claims. An appropriate Order accompanies this Opinion.

All Citations

Slip Copy, 2014 WL 1783146

Footnotes

1 In its Complaint, YFF names Petruzzi as its "principal."

2 The following allegations are summarized from the Counterclaim, and must be taken as true in deciding this Motion to Dismiss. *See Newman v. Beard,* 617 F.3d 775, 779 (3d Cir.2010). Certain factual allegations from the Complaint are not included here, as they are not relevant to this Motion.

3 The Court will consider the Howell Franchise Agreement, attached as Exhibit A to the Moving Brief, because it explicitly forms the basis of part of Defendants' Counterclaim. Further, Defendants do not dispute the authenticity of the Howell Franchise Agreement, and indeed rely on it in their Opposition Brief.

4 As noted by the YFF Parties, Defendants allege that Petruzzi represented that the franchisees' average sales were $685,000 when he made these representations to Ying regarding the Galloway Store, but represented that the franchisees were making $650,000 in average sales when he was making these same representations to Ying in regards to the Howell Store.

5 This reasoning also applies to Defendants' allegations regarding the number of new franchised stores that the YFF Parties anticipated opening within the coming year.

6 Furthermore, even if Defendants could plausibly use a violation of the FTC Rule as the basis for a fraud claim, their allegations would still fail. Under Item 19, a franchisor is permitted to provide financial performance information that differs from that included within Item 19 if it is "the actual records of an existing outlet [the franchisee] is considering buying...." Here, Defendants have asserted that the Galloway Statements were unlawful earnings claims under the FTC Rule; however, the Galloway Statements could be provided to Ying because they fall within this exception.

7 As the YFF Parties point out, most of these alleged contractual obligations are not promises of performance by YFF. For example, YFF's pre-opening obligations are specifically delineated in the franchise agreement in Articles 2, 4, 6, and 7, as well as summarized in the FDD. With the exception of these expressly disclosed obligations, YFF was "not required to provide you with any other assistance or service before you open your Store."*See* Countercl. Ex. C at 24; *see also* Compl. Ex. B at 10 (explaining pre-sale obligations, and that any additional supervision by YFF will be provided on the "sole discretion" of YFF). Furthermore, many of the allegations pertain to alleged broken promises by YWI, which was not a party to either the Galloway Business Sale Agreement or Manahawkin Franchise Agreement.

8 Here, even if the Court were to follow the reasoning of *Kavky,* Defendants' argument that the advertisement of an offer to purchase a franchise on the internet necessarily makes such an offer fall into the gambit of the NJCFA would make a narrow exception swallow the rule. It is axiomatic that franchisors advertise franchising opportunities on the internet; to hold that doing so makes such an offer fall into the NJCFA would essentially mean that any offer to a franchisee falls into the NJCFA.

9 The YFF Parties also moved to strike the jury demand by Defendants and to dismiss the claims for multiple and exemplary damages by Ying "to the extent that any of Defendants' claims survive...."*See* Br. at 41, 42. Because no claims have survived this Motion, the Court will accordingly not decide these matters.

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